SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 395

RICHFIELD OIL CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

VOL. IV

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[fol. 2114] Los Angeles, California,

Thursday, May 17, 1951, 2:00 P. M.

Mr. Hall: Shall we proceed, your Honor?
The Court: Proceed.
Mr. Hall: Mr. Colmery.

DAVID W. COLMERY, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

The Clerk: What is your name, please?
The Witness: David W. Colmery.
The Clerk: How do you spell your last name?
The Witness: C-o-l-m-e-r-y.

By Mr. Hall:

Q. Mr. Colmery, where do you reside?
A. In Arcadia, California.
Q. Do you operate two service stations in the city of Arcadia?
A. I do.
Q. One of them is located at 50 West Las Tunas Avenue at the corner of Live Oak, in the city of Arcadia?
A. Right.
Q. And the other is at 625 West Las Tunas Avenue on [fol. 2115] the corner of Baldwin,——
A. That's right.
Q. —in the city of Arcadia; is that correct?
A. Yes.
Q. Those stations are operated presently under a lease agreement with the Richfield Oil Corporation?
A. Yes.
Q. With reference, Mr. Colmery, to the first station at 50 West Las Tunas Avenue, on the corner of Live Oak, will you state before you started to operate the station there and entered into the lease whether or not you had any

interest in the property upon which you are presently operating?

A. I did, yes.

Q. And who is the owner of that property?

A. Mr. Kalliwoda, Mr. H. Kalliwoda—K-a-l-l-i-w-o-d-a, I think.

Q. That is correct, sir. Did you have a ground lease arrangement with Mr. Kalliwoda?

A. I did, yes.

Q. Will you state what negotiations you had with Richfield which culminated in the lease arrangement with Richfield, just briefly, so that the court can understand as to what happened?

A. I surrendered my ground lease to Richfield, on the condition that they build a service station which I would [fol. 2116] operate on a firm lease basis.

Q. Now, with reference to the property at 625 West Las Tunas Avenue, who was the owner of that property?

A. Land Escrow and Safe Deposit Company.

Q. Did you have any arrangements with them?

A. I did. I had the ground lease.

Q. Did you make a similar arrangement with Richfield relative to that property?

A. I did.

Mr. Hall: Will you mark these, please?

Mr. Paradise: May I suggest that different exhibit numbers be given to the different locations?

Mr. Hall: Very well.

The Clerk: Government's Exhibits 17 and 17-A, and 18 and 18-A, marked for identification.

(The documents referred to were marked Plaintiff's Exhibits 17, 17-A, 18 and 18-A, for identification.)

By Mr. Hall:

Q. Mr. Colmery, I will hand you Government's Exhibit 17A, and ask you if that is the lease which you received from Richfield Oil Corporation, covering the property at 50 West Las Tunas Avenue.

A. Yes, that is the lease.

Q. I will hand you Government's Exhibit No. 17, for identification, and ask you if that is the 3-C operator sales [fol. 2117] contract, which was executed at the same time as the previous exhibit, Exhibit 17-A?

A. That's right.

Q. I hand you Government's Exhibit 18-A, and I will ask you if that is the 3-C operator's lease you received from Richfield, and which you executed covering the property at 625 West Las Tunas Avenue in Arcadia?

A. That is.

Q. Handing you Government's Exhibit No. 18, I will ask you if that is the 3-C operator's sales contract which was executed and delivered simultaneously with Exhibit 18-A.

A. That is.

Q. Just to refresh your recollection while these are before you, Mr. Colmery, you will note that on Exhibit 17 and 17-A the date of the instruments is the 2nd day of August, 1946, and on 18 and 18-A the date of the instruments is the 11th day of December, 1946; is that correct?

A. That's right.

[fol. 2118] Mr. Hall: If your Honor please, the Government will offer into evidence its Exhibits Nos. 17, 17-A, 18, and 18-A.

Mr. Paradise: No objection.

The Court: They may be received.

The Clerk: Government's Exhibits in evidence.

(The documents referred to were marked Plaintiff's Exhibits 17, 17-A and 18 and 18-A and received in evidence.)

By Mr. Hall:

Q. Are those the leases or agreements under which you are operating the property at the present time, Mr. Colmery?

A. No, they are not.

Q. Have they been supplanted by other leases?

A. They have.

Mr. Hall: May I have the subsequent 3-C leases?

Q. Mr. Colmery, will you tell the Court the circumstances under which the leases now in evidence were supplanted by

different leases? Can you tell us about when you were first approached about that?

A. I was first approached approximately four or five months ago.

Q. Now, would that be November or December of 1950? Would you say that would be about right?

A. I think so.

Q. By whom?

[fol. 2119] A. I believe it was Mr. Bergman from the Pasadena office.

Mr. Paradise: I am sorry. I can't hear you, Mr. Colmery.

A. Mr. Bergman from the Pasadena office.

By Mr. Hall:

Q. What is Mr. Bergman's position, do you know?

A. He is the district manager.

Q. For?

A. For Richfield.

Q. And who else?

A. I believe Mr. Bergman brought them out the first time alone.

Q. Had you ever been communicated with previously about these new leases?

A. No.

Q. Did you know that Richfield wanted new leases executed?

A. No, I didn't.

Q. What did Mr. Bergman say to you?

A. He told me that he had these new leases which eliminated the exclusive contract dealers and that he would appreciate it if I would sign them.

Q. Had your previous lease expired?

A. No.

Q. How long did it have to run yet?

[fol. 2120] A. The one at 50 Las Tunas has about 17 years and the other one about 12.

Q. In reply to that statement what did you tell him?

A. I told him I wasn't interested in signing the leases which he had given me.

Q. And what other conversation between you?

A. There was very little conversation. All Mr. Bergman wanted was a yes or no answer.

Q. Did you make any suggestions to him?

A. Yes. I mentioned the fact that my original leases did not have a termination clause which would allow me to vacate the stations at my will, and that I felt that the length of time was rather long for me to assume the obligations, and I would accept the lease if the termination clause was put in there in my favor.

Q. Was there any agreement on it on that occasion?

A. No.

Q. When was the next time that you discussed these lease privileges with anyone at Richfield?

A. I think Mr. Duncan stopped in to see me a few days after that.

Q. Go ahead. What was the conversation between you and Mr. Duncan?

A. Well, it was very similar. Mr. Duncan told me at that time that he did not think that the company would allow [fol. 2121] for a termination clause, and the conversation was very short. I can't recall what was said.

Q. Did you reach an agreement relative to the lease that day?

A. No.

Q. When was the next time that any discussion was had between you and Richfield relative to the new leases?

A. Oh, it was two or three months later.

Q. And who was the conversation with?

A. Mr. Duncan and Mr. Will.

Q. And what is Mr. Will's position with the company, do you know?

A. I am not positive. He is connected with the legal department.

Q. What was the result of that conversation at that time?

A. The result was that I signed the new leases.

Mr. Hall: Will you mark these leases for identification, please?

The Clerk: Government's Exhibits——

Mr. Paradise: May I suggest that those pertaining to the location at Las Tunas and Live Oak be marked 17-B and 17-C? Would that be convenient?

Mr. Hall: It is all right with me.

Mr. Paradise: And the others as 18-B and -C.

[fol. 2122] Mr. Hall: Yes.

The Clerk: 17-B and 17-C?

Mr. Hall: 17-B and 17-C are the ones that cover the Live Oak address, these three.

(The documents referred to were marked Plaintiff's Exhibits 17-B and 17-C for identification.)

Q. May I ask you, Mr. Colmery, at the time they first approached you in November or December of 1950 did they have the forms of the leases with them?

A. Yes.

Q. And they were all drafted up for you to read and execute if you so desired?

A. That is right.

Q. I will hand you Government's Exhibits 17-B and 17-C and ask you if those are the new 3-C operator's lease and operator's sales contract which you executed as you have just testified?

A. Yes, they are.

Q. Those leases I have just submitted to you cover the premises at 50 West Las Tunas Avenue, is that correct?

A. Yes, that is right.

[fol. 2123] Q. Now, handing you Exhibits 18-B and 18-C, I will ask you if those are the operator's sales contract and operator's lease covering the property at 625 West Las Tunas Avenue, which you stated you signed and which supplanted the previous leases.

A. They are, yes.

Mr. Hall: I will ask that Government's Exhibits 18-B and -C and 17-B and -C be offered in evidence.

Mr. DeMartini: No objection.

The Clerk: Are these admitted, your Honor.

The Court: They may be received.

The Clerk: 17-B and -C, and 18-B and -C in evidence.

(The documents referred to were marked Plaintiff's Exhibits 17-B and 17-C, and 18-B and 18-C, and were received in evidence.)

By Mr. Hall:

Q. Handing you Exhibit 18, which is the previous operator's sales contract, covering 625 West Las Tunas, I will ask you what was the minimum amount of gasoline which was specified in that sales contract?

A. 5,000 gallons, or more.

Mr. Paradise: I object to that as misstating the contents of the written agreement.

The Court: All right.

Mr. Paradise: Isn't that correct? Isn't it correct that the minimum quantity is Mr. Colmery's entire require-
[fol. 2124] ments?

Mr. Hall: Yes, but it says "minimum."

The Court: All right.

By Mr. Hall:

Q. Handing you Government's Exhibit 18-B, may I ask if the minimum requirements stated there for gasoline are 11,500 gallons?

A. That's right.

Q. Was that change made with consultation with you at all?

A. Yes, it was.

Q. Had they inserted that before they submitted it to you, or after?

A. Before.

Q. Before?

A. Yes.

Q. So that when they first submitted this to you in December, these figures were present in there; is that correct?

Mr. Paradise: Now, that assumes a fact not in evidence, and actually is contrary to the evidence. He said these documents were not submitted to him in December. He said these documents were submitted to him in March.

Mr. Hall: Both times. I have covered that, Mr. Paradise. He mentioned that.

The Court: If there is any discrepancy, you can straighten
[fol. 2125] it out.

Mr. Hall: Surely.

By Mr. Hall:

Q. Will you state whether or not those figures were typed in there, the typewritten figures on minimum and maximum gallonage were in that sales contract when the lease was first submitted to you?

A. Yes, they were.

Q. Handing you Plaintiff's Exhibit 17 and 17-B, which are the sales contracts covering the property at 50 West Las Tunas Avenue, you will note that Exhibit 17 specifies 5,000 gallons with the word "minimum" above it?

A. That's right.

Q. And in Exhibit 17-B the minimum gallonage specified there is 14,500?

A. That's right.

Q. May I ask if at the time that was first submitted to you those figures in 17-B were already typewritten in on the instrument?

A. It was, yes.

Q. Mr. Colmery, have you ever had any discussions with any executives, representatives of Richfield, relative to the products which you should handle at either one or both of those stations?

A. Yes.

Q. Can you tell me when?

[fol. 2126] A. Well, at the time the leases were drawn up.

Q. Yes.

A. Are we talking about these new leases now?

Q. No, I covered it first by asking you at any time, so you can start with the first discussions you had.

A. Oh, yes, when I was negotiating for the original leases with Mr. Duncan, we started out with a much higher minimum gallonage, and I told him I thought it was too much, and we argued around a little until we got it down to 5,000 gallons.

Q. Well, was anything said as to the kind of products that you would have to sell in that station?

A. I don't think there was.

Q. Was there at any time while this first lease was in effect, let us say, that any discussion was had with you relative to the products that you should handle?

A. No, I don't think so, other than——

Q. What did you handle in the station up until the 28th of March, 1951? Strike that question.

Are you familiar with Richfield approved products?

A. I am, yes.

Q. Did you handle any gasoline other than Richfield gasoline?

A. No.

Q. Did you handle any motor oils other than Richfield [fol. 2127] motor oils?

A. Yes.

Q. What?

A. Oh, a little Quaker State, and Pennsylvania oil, Pennzoil.

Q. Who was the salesman that called on you relative to the sale of Pennzoil?

A. A party by the name of Ellis.

Q. Do you remember his calling upon your station on occasions since you have been in there?

A. I do.

Q. Do you remember his calling upon you in the latter part of the year, 1949?

A. Yes.

Q. Was there any discussion between you and Harry Ellis relative to the application of the decree in the Standard Oil Company case?

Mr. DeMartini: I object. This line of testimony is leading.

Mr. Hall: I was just going to point it up, and then going to ask him.

Mr. DeMartini: I withdraw the objection.

By Mr. Hall:

Q. What was that conversation?

A. Mr. Ellis told me that I could now, due to the decision in the Standard Oil case, that I was free to handle Pennzoil [fol. 2128] or any other type of oil I wished.

Q. What did you state in reply to that?

A. I told him I didn't think I was.

Q. Did you make any other statement?

A. Yes, I said words to the effect that it was in violation of my lease, and then he insisted that it wasn't in violation of my lease; and I don't think I chose to argue with him at the time, so I made——

Q. Did you make any other statement——

The Court: Just a moment. You interrupted him. You made what?

The Witness: I made a remark to the effect that if the Richfield Oil Company wanted to, there was probably other reasons in my lease so that they could eliminate me from the properties.

By Mr. Hall:

Q. Now, do you recall that Mr. Ellis called at your station sometime the first of this year, within the first two or three months?

A. Not definitely.

Q. Do you have any recollection of any conversation with him in 1951?

A. No, I don't.

Q. In your station there, or, in either one of your stations you stated you had handled these oils. Did you handle any TBA products which are not approved by Richfield? [fol. 2129] A. Yes, I did.

Q. As to tires, what tires do you handle?

A. Well, I handle Goodyear tires. I have sold other kinds.

Q. Do you stock other kinds at all?

A. I have, yes.

Q. Have you any in your station now?

A. Yes.

Q. How many?

A. I have just four, I think. There may be five, one——

Q. Relative to batteries, what brand of batteries do you handle?

A. Goodyear and Nickel Silver.

Q. Do you handle both of those brands in each station?

A. No. No, I handle Goodyear at the station at 50 Las Tunas, and Nickel Silver at the station at 625 Las Tunas.

Q. Is there any reason why you handle the Nickel Silver battery in preference to the Richfield battery?

A. It's a—in price it is a more competitive battery.

Q. Can you give me the difference in price of a comparable battery, as between the Nickel Silver and the Goodyear battery, that is, the price to the customer?

Mr. Paradise: I submit that is immaterial, unless it is first determined that this man has been prevented or there [fol. 2130] has been a suggestion made that he cannot handle it. This is a dealer station not an L-O station.

The Court: I think the difference in price or other reason for handling is material in showing a desire to handle other products, which he may have been thwarted from handling, but to go into detail is not necessary. I think he already stated there was a difference in price, but what it was we are not interested in. I will sustain the objection to the question.

[fol. 2131] Mr. Hall: I will ask you this question, Mr. Colmery.

The Court: Because it is material. We are talking about striking at our competition. It is material to establish that there was competition, that the man not only had a right to but he actually wanted to deal with the outside.

Mr. Hall: Yes, that is true.

The Court: Unless you establish that, those two essential elements are missing because, if a man does not want to deal on his own account, then it does not make any difference. All other reasons become immaterial to the issue here. All right.

By Mr. Hall:

Q. I will ask you this, Mr. Colmery: Have you at any time ever expressed to anyone a dissatisfaction with the adjustment policy of the Goodyear battery people?

Mr. Paradise: Objected to as immaterial.

The Court: Overruled.

A. Yes, I have.

By Mr. Hall:

Q. And can you give us the circumstances why you have made that objection to their adjustment policy?

A. The one case that I have in mind was a cracked battery which the customer was quite perturbed about. So I put a new battery in it. I had no choice if I wanted to hold her business. And I sent the cracked battery in to the Goodyear dealer and a few days later it came back, and my instructions were that the battery—they gave me a little bit of tar and said I could conceal the crack up with the tar [fol. 2132] and a soldering iron. So I got the cracked battery back.

Q. Were you ever able to get an adjustment out of the dealer or the distributor?

A. No, I was not.

Q. Have you had any other difficulties with Goodyear batteries on adjustments?

A. Nothing serious.

Q. Are you satisfied with their adjustment policy generally?

A. No.

Q. Then, may I ask why it is that if you are not satisfied with the Goodyear batteries you continued to carry them exclusively in one of your stores?

A. I carry them exclusively—my two stations are very closely related on that.

Q. They are about five or six blocks apart, aren't they?

A. Just one mile, and it is a good straight road between the two of them, and actually the stock of one battery and the other, I do intermingle them. In other words, if somebody comes in one station and wants a Goodyear battery, I will go down there and bring it back, or vice versa.

Q. Do you carry a similar sized stock of Exide or U. S. Royal batteries in case they want one of those?

A. No.

[fol. 2133] Q. But you do carry a full stock of Goodyear batteries?

A. Yes, sir.

Q. And have you any explanation as to why you carry that full stock of Goodyear batteries?

A. At the time I opened the station I stocked it with Goodyear batteries and there was a trickle charger with Goodyear signs on it, and there has never been too much reason to change.

Q. Has there been actually any material change in the operation of your stations since the 28th of March, 1951, from the way you were operating them previously?

A. No, I don't think so.

Q. Have any Richfield officials since the execution of these new leases told you that you could or could not handle any particular items of tires, batteries or accessories?

A. No.

Mr. Hall: That is all. Just a moment, Mr. Paradise.

Q. At the time that you entered into these new leases what was your actual gallonage at the station at 50 West Las Tunas, your normal average?

A. It has been averaging 18,000 to 20,000.

Q. And at 625 West Las Tunas?

A. Fourteen to fifteen.

Mr. Hall: That is all. You may have the witness, Mr. [fol. 2134] Paradise. Thank you.

The Court: All right.

Cross examination.

By Mr. Paradise:

Q. Mr. Colmery, that matter of the purchase of Goodyear batteries that you were asked about at the tail end of Mr. Hall's examination, I think he asked you whether at any time since March 28, 1951 you had been told by any Richfield official that you were free to handle accessories other than Richfield approved accesories, am I correct? And I take it you answered that you had not been so told since March 28, 1951 that you were free to handle other items than Richfield approved items?

A. They have never been——

Q. Pardon me?

A. They have never been mentioned since that date.

Q. I want to ask you at any time prior to March 28, 1951 had you ever been told by any Richfield employee or representative that you could not handle non-approved Richfield merchandise, and when I speak of "merchandise" I am talking about tires, batteries or accessories.

A. No.

Q. You were never so told, were you?

A. No.

Q. From whom did you buy the bulk of your tires, batteries and acessories?

[fol. 2135] A. Mr. Charlie Cole.

Q. Who is Mr. Charlie Cole?

A. He is the TBA distributor of Richfield.

Q. Richfield's TBA distributor?

A. That is right.

Q. What reason do you have for buying those things from Mr. Cole?

A. Mr. Cole is—the TBA distributor stocked my station at the start, then he comes around every week. It is continual, and he carries my account, and Charlie is a pretty nice fellow. So most of the merchandise, I can't buy it any cheaper anywhere else. There is some items I can. The ones that I can, I do.

Q. Do you get as good service from him as from the others?

A. Yes.

Q. Has either he or any employee or representative of Richfield Oil Corporation ever told you that it was necessary or expected of you to buy all or any of your tires, batteries or accessories from Mr. Cole.

A. No.

Q. Now going back to the time when these stations were first built, I understood you to say that you had a lease on the property at 50 West Las Tunas. Is that the one on the corner of Las Tunas and Live Oak?

[fol. 2136] A. Yes.

Q. Who is the owner of that property?

A. Mr. Kalliwoda.

Q. Kalliwoda. Since these are both on the same street, maybe it would be simpler for me to identify them by that name. That is the Kalliwoda property we will call it.

A. That is right.

The Court: Did you say he owned both lots?

The Witness: No, no. He owns the one and the Land Escrow & Safe Deposit Co. owns the other.

By Mr. Paradise:

Q. What is the name of the company that owns the other?

A. Land Escrow & Safe Deposit Co.

Q. You had written leases from both of those companies?

A. That is right.

Q. I mean from both of those owners?

A. That is right.

Q. Running from them, respectively, to you as lessee in each instance?

A. That is right.

Q. At the time you had those leases were either of those properties improved with service stations?

A. No.

Q. In what condition was the land at the time you held those leases?

A. Vacant.

[fol. 2137] Q. Both parcels were vacant?

A. That is right.

Q. Did you have any discussions concerning either of those properties with any representative of the Richfield Oil Corporation?

A. I did.

Q. Did you also have discussions with other oil companies concerning them?

A. Yes.

Q. With what representative of Richfield Oil Corporation did you discuss those properties?

A. I believe my original discussions were with Mr. Shaffer, who was then branch manager of the Pasadena office for Richfield.

Q. Did you also have discussion with Mr. Duncan concerning them?

A. I did.

Q. To sum the matter up, is it not correct that as a result of discussions between you and Mr. Shaffer and Mr. Duncan you made an arrangement with the Richfield Oil Corporation by which you agreed to surrender your leases to the property owners and cancel your leases if Richfield would take direct leases from each of those property owners di-

rectly, and at the same time enter into long-time subleases directly to you on each location?
[fol. 2138] A. I did.

Q. Is that correct?

A. That is right.

Q. Let us take the Kalliwoda property first, Mr. Colmery.

May I ask that this lease dated August 2, 1946, between Herbert Kalliwoda and wife, as lessor, and Richfield Oil Corporation, as lessee, be marked as defendant's exhibit——

Mr. Dixon: Counsel, the Government will agree, so that the record will be straight on it, that that exhibit may be made a part of the Government's exhibits in connection with that property.

Mr. Paradise: Fine.

Mr. Dixon: That will be 18.

The Clerk: -D.

Mr. Hall: Then it is 17 or 18, the next letter.

Mr. Paradise: It will be 17, I think. Does the 17 refer to the Kalliwoda property?

Mr. Hall: Yes, I am sure it does.

The Clerk: 17-D marked for identification.

Mr. Paradise: I will offer it into evidence if the Government has no objection.

Mr. Dixon: No objection.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.
[fol. 2139] The Clerk: 17-D in evidence.

(The document referred to was marked Plaintiff's Exhibit 17-D and received in evidence.)

By Mr. Paradise:

Q. It was the understanding, was it not, Mr. Colmery, that when Richfield leased this property from Mr. and Mrs. Kalliwoda, and you at the same time surrendered your lease to Mr. and Mrs. Kalliwoda and took the sublease directly from Richfield, that Richfield agreed to build a service station on this property?

A. That is right.

Q. Do you know whether Richfield did build a service station on the property?

A. Yes, they did.

Q. Do you have any knowledge as to the cost of that service station?

A. At the time I contacted a contractor about it to find out, and a double-wing service station, so to speak, ran between—oh, twenty to twenty-five thousand dollars, I believe.

Q. At the time, as a part of the same transaction, Richfield subleased to you the property under Government's Exhibit 17-A by an instrument dated the same date as the ground lease, that is to say, on August 2, 1946, that is correct?

A. Yes.

Q. And that that sublease was for the full 20-year term [fol. 2140] of the ground lease, less one day, is that not correct?

A. That is right.

Q. Do you know whether or not that sublease permitted you or Richfield to terminate that sublease at any time prior to the 20-year period? I mean an arbitrary right of termination?

A. There was no way I could terminate. There were various means, I think, that Richfield could terminate.

Q. Well, I think the agreement on that score will speak for itself. But, so far as you know, you had no right to terminate it, is that correct?

A. That is right.

[fol. 2141] Q. Right. Is it not correct that any right that Richfield had to terminate the agreement was based on some default by you in the payment of the rent, or some other provision?

A. Yes.

Mr. Dixon: Will counsel stipulate it is all tied into the sales contract, that is, that Richfield had the right to cancel the sublease to this witness in the event the sales contract was canceled by Richfield?

Mr. Paradise: I will be glad to compare the agreement

during the recess, Mr. Dixon, and if that is true, I will read it into the record.

By Mr. Dixon:

Q. Now, this sales contract, which is Government's Exhibit 17, on this 3-C transaction, was entered into as a part of the same transaction, was it not? I mean, it was entered into at the same time?

A. Yes, the sales contract and the lease.

Q. Yes. What discussion did you have concerning the agreement contained in paragraph 1 of this sales contract, under which you agreed to buy your entire requirements of certain described automotive petroleum products, and which agreement also contains the provision that as to gasoline, you agreed to buy the minimum of 5,000 gallons, as to lubricating oils a minimum of 50 gallons, and as to greases a minimum of 50 pounds?

[fol. 2142] A. You want to know what discussion I had pertaining to that?

Mr. Dixon: That is per month, counsel?

Mr. Paradise: Per month, yes.

By Mr. Paradise:

Q. Yes, the discussions pertaining to the petroleum products that you would buy from Richfield under that contract, and I am talking about discussions that occurred in connection with the negotiation of this transaction back just prior to August 2nd, of 1946.

A. I have already stated that my discussion was as to the amount of minimum requirements, and originally the minimum requirements were higher, and after my discussion with Mr. Duncan, why, they were lowered to these figures.

Q. That was a new location, and you didn't know what experience you were going to have insofar as monthly gallonage was concerned; is that correct?

A. That's right.

Q. Is it not also a fact that Mr. Duncan at this time made it clear in his conversation with you that Richfield was not interested in taking a lease from Mr. and Mrs. Kalliwoda

for a 20-year period, and then subleasing it to you for a 20-year period, and also agreeing to build a service station on this property, unless you, as a part of the transaction, agreed to buy your entire requirements of gasoline and lubricating oil from Richfield?

[fol. 2143] A. That was understood, yes, sir.

Q. Was that not also discussed at that time?

A. I can't recollect that it was at that time. I know it was discussed and understood.

Q. Well, you understood that the reference in that sales contract, dated August 2, 1946, to a minimum of 5,000 gallons, that in that respect the minimum meant that you agreed to purchase that quantity but that, nevertheless, if your requirements were greater than that, that you would buy all of your gasoline and lubricating oil from Richfield, did you not?

A. That's right, yes.

Q. And you understood that at the time you made the contract?

A. I did.

Q. All right. Now, let's come to the parcel known as the Land Escrow Company's parcel.

Mr. Paradise: By suggestion of Mr. Dixon, this will be marked Government's Exhibit 18-D.

Mr. Dixon: Yes, if that is the next in order.

Mr. Paradise: I will identify it as the ground lease, dated December 11, 1946, between Land Escrow and Safe Deposit Corporation, as lessor, and Richfield Oil Corporation, as lessee.

The Clerk: Government's Exhibit 18-D, marked for iden-

[fol. 2144] tification.

Mr. Paradise: It is offered in evidence.

The Clerk: Is this admitted, your Honor?

The Court: It may be admitted.

The Clerk: 18-D in evidence.

(The document referred to, marked Plaintiff's Exhibit 18-D, was received in evidence.)

By Mr. Paradise:

Q. Now, in connection with the discussions concerning this parcel of land, Mr. Colmery, were not the discussions approximately the same as those which you have just described concerning the Kalliwoda parcel?

A. They were, yes.

Q. Did you not also, in connection with this parcel of property, request that Richfield take a lease directly from the Land Escrow Company, build a service station on the property, and sublease the property to you for a period of 15 years, and that if Richfield would so do you would surrender your written lease to the Land Escrow Company and cancel that lease?

A. Well, that is a summary of the transaction. I don't like the first word "request" that was used. I don't think I requested it.

Q. Put it in your own words, then. I didn't mean to suggest any answer. I am just trying to get at the facts as [fol. 2145] simply as possible.

A. Yes, the suggestions of handling it in this manner were made by the Richfield representatives. That I am sure of.

Q. Is it not true that you also said to the Richfield representative that you would not surrender your lease to the Land Escrow Company until you received back a firm sublease for the full 15-year period?

A. I did, yes.

Q. And also an insistence that Richfield, at its own cost, construct a service station on that property?

A. That's right.

Q. Do you know what the cost of that station was?

A. I think around 15,000.

The Court: I didn't hear that.

The Witness: Around $15,000. It is a single wing station.

By Mr. Paradise:

Q. That is a less expensive type of construction than the one on the Kalliwoda property?

A. That's right, yes.

Q. Now, in connection with that transaction then, this 3-C lease by Richfield to you, and the 3-C sales contract be-

tween you and Richfield, both dated December 11, 1946, were entered into as a part of that transaction; is that correct?

[fol. 2146] A. They were, yes.

Q. What conversations did you have with respect to the provisions of paragraph 1 of the sales contract, which is Government's Exhibit 18, at the time of the execution of this agreement? That is the provision concerning your obligation to buy your entire requirements of petroleum products from Richfield.

A. Regardless of the dates on these, the conversations pertaining to both of them were simultaneous.

Q. Oh, I see. The paper work on the second transaction was later?

A. That's right.

Q. What was the cause of the delay as to the Land Escrow parcel, do you know?

A. I don't recall. I really don't, but I do recall that I wanted the same type of station on each corner, and the leases were—I think I wrote a letter to the effect that the first lease wasn't acceptable until the other one was negotiated at the same time.

Q. I see. So the leases and sales contracts on both parcels were all a part of one transaction?

A. That's right.

Q. I see. Similarly, is it also true that with respect to the sales contract covering the Land Escrow parcel, that there again you asked to have the minimum quantity put [fol. 2147] at a low figure because you didn't know what that station would do after it was constructed at some future time?

A. That's right.

Q. Now, subsequent to the opening of the station on the Kalliwoda property, what gallonage did that station produce?

A. I can't answer that one.

Q. You don't recall?

A. You said subsequent to the opening? Repeat the question, please.

Q. After the station was built and you started operating the station, and it got well under way,——

A. Yes.

Q. —what gallonage of gasoline did it start producing?

A. If I recall, it started out around twelve or thirteen thousand, and within, oh, two or three months, it was up to fifteen, sixteen. The station has just gradually grown over a period of three years.

Q. What was your experience with respect to the station on the Land Escrow parcel?

A. The first month we opened, it was the best month I ever had. It did about a little better than 15,000 gallons, I believe. The next month we opened the other station, so half the business went down there, and this one fell off. [fol. 2148] So since then that has been gradually growing up.

Q. Now, calling your attention to the conversation that you mentioned with Mr. Bergman and Mr. Duncan, at which time they suggested a modification of the sales contract and sublease to you, will you first tell me as closely as you can recall when that occurred?

A. Which? I will have to ask a repeat on that.

Q. Mr. Hall asked you who it was who first presented an amendment to you of your sales contract and sublease sometime last fall, and I understood you to say it was a Mr. Bergman.

A. Yes.

Q. Was anyone else with him?

A. I don't think so.

Q. I heard you also mention Mr. Duncan. Did he come out on a separate occasion?

A. Yes.

Q. When did you have your discussion with Mr. Bergman, as nearly as you can fix it?

A. It's very difficult. I can just state it was towards the end of 1950. I can't——

Q. I see. Sometime before Christmas?

A. I think it was.

Q. Now, at the time Mr. Bergman came out, did I understand you to say that he presented to you at that time these [fol. 2149] same instruments,—the same sales contracts which are Government's Exhibits 17-B and 18-B? (Handing documents to witness.)

A. You mean exactly the same or——

Q. Yes, I gathered from Mr. Hall's statement to me, in response to one of my objections, that I had misunderstood your answer.

A. Well, there is no way I can determine the exact—the general appearance of the contract is the same as the one that Mr. Bergman had.

Q. You mean it was on a pink form?

A. That's right. And I do know that Mr. Bergman pointed out to me that the exclusive contract clause had been eliminated, and I refused to sign it, so he took the papers with him.

Q. I see.

A. Now, I'll take that back. He left those papers with me for a day or two and came back later, in two or three days, and picked them up.

Q. What else did Mr. Bergman say at that time concerning the exclusive requirements clause?

A. I don't think Mr. Bergman said anything in regard to that other than it was eliminated.

Q. Did he tell you why it was eliminated?

A. I don't believe so.

[fol. 2150] Q. Did he point out to you that there was a quantity provision in here?

A. Yes, I think so. We discussed that.

Q. When Mr. Bergman came out, did he not bring out with him new sales contracts on both of the stations, both the Kalliwoda station and the Land Escrow station?

A. Yes, he had the two papers.

Q. And two new subleases?

A. That's right.

Q. In declining to sign those, did you not inform Mr. Bergman that your reason for not doing so was that you wanted to amend the basic lease in order that you might have a right to terminate your leasehold from Richfield at any time on 30 days' notice?

A. I did.

Q. And what did Mr. Bergman tell you in response to that?

A. He said—he told me that the only thing he could do

was send them back in to the home office with that report, and see what they said.

Q. Now, when did you next hear from the Richfield organization, or any Richfield employee?

A. Well, Mr. Duncan stopped in one day. It was within probably a week or two, or maybe three weeks of when I first talked to Mr. Bergman.

[fol. 2151] Q. He came to your service station?

A. That's right.

Q. And what was his discussion?

A. He had the leases with him, and he wanted me to sign them. However, there was no change in them and I refused.

Q. You mean no change with respect to the termination?

A. That's right. I also told him at that time that I wanted the minimum gallonage set back.

Q. Pardon me?

A. I also at that time told him I would like to have the minimum gallonage reduced.

Q. Do you remember the minimum gallonage that was specified in the contracts at the time Mr. Duncan came out?

A. I believe it was the same as it is in those now. If it wasn't, it was very close to it.

Q. I see. Do you recall the figures that are in here?

A. Fourteen five and eleven five, isn't it?

Q. That is correct, yes.

Those were the same figures that Mr. Duncan presented to you?

A. I think so.

Q. Now, at the time Mr. Duncan came out there, do you recall what your gallonage was at those respective stations, [fol. 2152] on an average basis?

A. About the same as it is now, the same figures I gave you. It is eighteen to twenty thousand and thirteen to fifteen thousand.

Q. The larger one relates to the Kalliwoda station?

A. That's right.

Q. Now, you had a discussion then, a further discussion with, I think you mentioned Mr. Duncan and Mr. Will, in connection with these instruments dated March 28, 1951,—

A. That's right.

Q. —which are Government's Exhibits 17-B and 17-C and 18-B and 18-C, and will you state what conversations occurred with respect to the quantities of gasoline referred to in these respective contracts between you and Mr. Duncan and Mr. Will?

A. Mr. Duncan and Mr. Will assured me of the fact that the minimum requirements, as they were written there, were not too important, and the clause below has various means of reducing that quantity, in case business is bad, or gasoline is rationed, or acts of God, or very low supply, and in case my gallonage should drop down, why, my minimum gallonage would be reduced.

Q. Now, did Mr. Will explain to you, either Mr. Will or Mr. Duncan explain to you how the quota of 11,500 gallons had been computed on the sales contract which relates to the Land Escrow property?

[fol. 2153] A. Yes.

Q. What was said?

A. I believe the figures were 75 per cent—it was a computation of 75 per cent of my previous year's average.

Q. Who said that?

A. I think it was Mr. Will.

Q. Did Mr. Will make any statement to you concerning what your obligation was under this contract?

A. My obligation? Yes.

Q. What did he say?

A. My obligations were to purchase the petroleum products in the quantities listed there, with the restrictions that they are based on in the clause below there.

Q. Is it not correct that Mr. Will stated to you, and I am now referring to Government's Exhibit 18-B, where it is 11,500 gallons, and that is the one that relates to the Land Escrow property—is it not correct that Mr. Will stated to you and explained to you that your only obligation under this contract was to purchase 11,500 gallons, and did he not also explain to you that where it says "20,000 gallons," that you had the right to buy any excess gasoline that you wanted up to that quantity?

A. Yes, I had a right to buy in excess. However, on the

minimum, my understanding is that if I fail to buy that [fol. 2154] minimum, I am still not in violation of the lease.

Q. I see.

A. That was my understanding.

Q. Was there any discussion between you and Mr. Will of this clause that shows the figures, and I will read it to you:

> "The above quantities represent those to be purchased and sold under normal business conditions, and in the event, because of climatic or other conditions, buyer's sales are abnormally less during certain months of the year, the aforesaid quantities will be proportionately reduced for said months, based upon previous business experience of buyer's station or of business generally in the vicinity, in the event buyer's station has had no previous business experience."

Was there a discussion concerning that clause?

A. Yes.

Q. What was the discussion?

A. Mr. Will explained to me that that would cover, in case my business fell off or anything happened that I could not get the gasoline to sell, that clause would cover—would excuse me from the purchase of the minimum requirements, or words to that effect.

[fol. 2155] Q. Was it not also discussed, and did you not also understand, Mr. Colmery, that at that station if you had need for in excess of 11,500 gallons in any month, that you were free to purchase from anyone other than Richfield,—the excess quantity?

A. I don't think that was mentioned.

[fol. 2156] Q. I did not hear you.

A. I say, I don't think that was mentioned, any excess quantities, other than that I was free to buy it from Richfield.

The Court: Was any other competitive concern mentioned as a source at all in regard to gasoline, to buy gasoline, somebody else's gasoline and put it in your tanks at any time?

The Witness: I don't believe that was discussed at all.

By Mr. Paradise:

Q. At least, you do not recall any discussion, is that it?

A. About me putting competitors's gasoline in the station?

Q. No, not about you putting it in, but you having the right to buy from whomever you saw fit any quantity that you needed over and above this excess of 11,500 gallons, that you had the right to do it? That does not compel you to buy it from anyone, but the right to buy it.

A. I don't think that was discussed.

Q. You recall no discussion.

The Court: All right.

By Mr. Paradise:

Q. Mr. Colmery, I see on this lease contract that covers the Land Escrow property that the figures in connection with lubricating oil have been stricken out, the typewritten figures have been stricken out, and changed from 115 [fol. 2157] gallons and the number "65 gallons" is written in in ink.

A. That is right.

Q. And I also see that on the same contract the typewritten figures "115 pounds of grease" has been stricken out in ink and the figure of "50 pounds" has been inserted in ink.

A. That is right.

Q. And that both of those numbers have been initialed.

A. That is right.

Q. What brought that about? What occasioned that change?

A. I explained to Mr. Will that my station does not hold up to the average on grease and oils. In other words, the amount of grease and oil is determined by the amount of gallons sold. And I felt that that quota was a little higher than I could make and so he changed them.

Q. The figures that were inserted were the figures that you requested?

A. The figures was written in.

Q. In ink, yes.

A. Are the ones that I requested?

Q. Yes.

A. Yes. We just about cut them in two, if I remember right.

Q. Did Mr. Will explain how the figures of 115 gallons [fol. 2158] and 115 pounds had been arrived at?

A. Yes. I think it was one per cent of the gallonage. Is that right?

Q. I don't know. It is whatever he told you.

A. He told me. I don't remember if it is one per cent. I think that is one per cent, yes.

Q. With respect to the sales contract covering your other station, the Kalliwoda station, which is also dated the same date, March 28, 1951, was that sales contract also discussed at the same time between you and Mr. Will and Mr. Duncan?

A. Yes, they were discussed simultaneously.

Q. What was the discussion with respect to the 14,500 gallon minimum that is contained in the sales contract which is Government's Exhibit 17-B?

A. The discussion was simultaneous with the other station. I mean the two of them were given to me and we talked about the two leases as if they were one.

Q. I see. Then, to shorten this, was it also discussed between you, Mr. Duncan, and Mr. Will that that quantity had been fixed at approximately 75 per cent of the average of your previous gallonage at that station?

A. It was.

Q. And that that was your obligation under this contract, subject to the following clause concerning reduction for climatic conditions?

[fol. 2159] A. That is right.

Q. And that you had the right to buy an additional quantity up to the stated maximum of 25,000 gallons?

A. That is right.

Q. I notice that the typewritten figures concerning lubricating oils and greases have also been stricken out in ink and changed in ink and initialed on that contract, also.

A. That is right.

Q. Was that for the same reason as you have already testified to?

A. Yes.

Mr. Paradise: At the suggestion of the Government I am going to ask that these be marked. They are two mimeographed forms, each entitled "service station gallonage, D. W. Colmery," and with different addresses, the one relating to Las Tunas and Live Oak. That is 17. I think that is the Exhibit 17 group, is that correct?

The Clerk: It will be 17-E marked for identification.

(The document referred to was marked Plaintiff's Exhibit 17 for identification.)

Mr. Paradise: I offer it.

The Court: It may be received.

The Clerk: 17-E in evidence. Government's 18-E marked for identification.

(The document referred to was marked Plaintiff's Exhibit 18 for identification.)

[fol. 2160] Mr. Paradise: That pertains to——

Mr. Dixon: I would suggest, counsel, that before they are received in evidence that this witness be asked to verify the gallonage.

Mr. Paradise: Oh, yes. I haven't offered them in evidence yet.

The Clerk. 17-E is in.

The Court: All right.

By Mr. Paradise:

Q. 18-E bears the title "D. W. Colmery, Las Tunas and Baldwin," and that is the Land Escrow property, is that correct?

A. Come again. Let me see it.

Q. I just want to make sure that we have the right numbers on this. It is Exhibit 18-E, the figures on this pertain to the Land Escrow parcel?

A. Yes.

Q. And the Exhibit 17-E, do these figures pertain to the Kalliwoda parcel?

A. Yes. Now, let me modify this. These are your figures. I have never seen them before.

Q. I agree with you. That was going to be my next question, Mr. Colmery. I was going to ask you to examine

these figures and ask you whether, as nearly as possible, you can recall whether or not those figures correctly express and state the gallonage at those respective stations during the months therein named, that is to say, from [fol. 2161] February of 1950 through March of 1951?

A. Yes.

Mr. Hall: Just one moment. May I ask, your Honor, that Mr. Paradise explain the figure of the gallonage as to whether or not he is referring to the amounts that are delivered by Richfield or the amounts that are sold by Mr. Colmery, so Mr. Colmery's answer will be correct in either event?

Mr. Paradise: It is my understanding that those figures represent gallonage delivered by Richfield to those stations during those months.

Mr. Hall: As long as Mr. Colmery understands it, it is okay.

The Witness: They look approximately right, yes.

Mr. Paradise: May I offer these in evidence?

The Court: They may be received.

The Clerk: Government's 17-E and 18-E in evidence.

(The documents referred to were marked Plaintiff's Exhibits 17-E and 18-E and received in evidence.)

The Court: Anything further?

Mr. Paradise: Yes, I have two documents. This will be quite short, your Honor.

The Court: That is all right. You were silent there and I did not know.

Mr. Paradise: I was searching for something in the agreement.

[fol. 2162] The Court: That is all right.

By Mr. Paradise:

Q. Mr. Colmery, in these instruments that you signed in March, the instruments of the new sales contract and the new sublease on each station, did the subleases contain, as you had required, a provision permitting you to terminate your sublease on each station?

A. They did, yes.

Q. Is it correct that paragraph 18 of Government's Exhibit 18-C expresses what your wish was in that regard as a condition to signing the amendment to the sales contract, and I will read it to you:

> "Lessee shall be privileged to terminate this lease at any time during the term hereof by means of a prior 30-day notice in writing to lessor"?

A. That is right.

Q. And does the sublease covering the Kalliwoda property contain the same clause in paragraph 19?

A. It does, yes, sir.

Q. Now I will call your attention, Mr. Colmery, to a provisions in your original sublease on each of these two properties, and I am reading the last sentence of paragraph 3 of the printed clause, and it says this:

"Lessee"——

which refer to you as lessee in this case——

> "Lessee shall make no change, alteration or sub-
> [fol. 2163] stitution in the demised premises, improvements, buildings, fixtures and equipment except such as may be necessary to enable lessee to continue business on said premises, unless the consent in writing of the lessor be first obtained."

You were familiar with that provision of these leases?

A. Yes.

Q. On both of those parcels of property?

A. Yes.

Q. Both the Kalliwoda and the other?

A. Yes.

Q. At the time the new subleases were brought out to you and which new subleases on both parcels contained the right of termination which you had requested, was there called to your attention the fact that paragraph 3 of both of the new subleases had had that clause eliminated?

A. Yes.

Q. Was that matter discussed between you and Mr. Duncan and Mr. Will?

A. No.

Q. It was merely called to your attention?

A. Yes.

Mr. Paradise: That is all. Oh, just one moment. That is all.

The Court: All right, any redirect?

[fol. 2164] Mr. Hall: Just one matter I want to clear up that was brought out.

The Court: All right.

Mr. Hall: I will not permit myself but two questions, your Honor.

The Court: Well, all right.

Redirect examination.

By Mr. Hall:

Q. Mr. Colmery, this explanation that I believe you testified Mr. Will made to you as to this second or last paragraph of paragraph 1 of the sales contract which he stated relieved you in case the gallonage went down, you would not have to live up to the minimum, do you recall that statement, that clause?

A. Yes. Yes, I understood.

Q. Did he explain to you what the company position was as to what would be understood to be normal business conditions if your gallonage fell below the minimum?

A. Yes. It was based on conditions of other service stations, more or less on an average.

Q. Did he explain to you how much ground was covered by this climatic conditions or other conditions, what they meant?

A. No, not in too much detail.

Q. Can you give us his language that he explained this to you as to how you would be relieved from the minimum [fol. 2165] requirements of the contract?

A. Well, Mr. Will explained that there was just absolutely nothing to worry about there, that in the case gallonage fell off for any reason, it was covered in this clause.

Q. Did you ask him, if that was the case, why they specified a minimum gallonage?

A. Yes.

Mr. Paradise: That, I submit, is argumentative.

The Court: Yes.

Mr. Hall: No. I wanted what Mr. Will's answer was.

The Court: Well, he is not a lawyer. I will sustain the objection. Anything further?

Mr. Hall: That is all, your Honor, from this witness.

Mr. Paradise: Nothing further.

The Court: All right. Step down. A short recess.

(Short recess.)

[fol. 2166] The Court: All right, gentlemen, call your next witness.

Mr. Somerville: Mr. Gordon McRae.

Gordon McRae, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?

The Witness: Gordon McRae.

The Clerk: How do you spell your last name?

The Witness: M-c-R-a-e.

By Mr. Somerville:

Q. What is your name, sir?

A. Gordon McRae.

Q. Where do you reside?

A. In Redondo Beach.

Q. Mr. McRae, have you ever operated a service station handling Richfield gasoline at 3016 Main Street in Ocean Park?

A. Yes, sir.

Q. Ocean Park, California?

A. Yes, sir.

Q. Can you tell me approximately when you first started [fol. 2167] operating the station?

A. About 1939 through 1946. In about '46 I turned it over to my partner, Raymond Bennett.

Q. Did you enter into a lease with Richfield concerning that property?

A. Yes, sir, in about 1939.

Q. Whom did you see about taking over that station?

A. I talked with Mr. Cook, a merchandiser of Richfield, and Mr. Vaughn, branch manager.

Mr. Somerville: May it be stipulated, counsel,——

Mr. DeMartini: It may be stipulated it was an L-O station. That is correct, is — not, Mr. McRae?

The Witness: Pardon? Was it a leased out?

Mr. DeMartini: Yes, the original lease on that station?

The Witness: Richfield held the master lease on it until, I would say, '42, approximately.

By Mr. Somerville:

Q. Mr. McRae, who did you say checked you into that station and turned the premises over to you?

A. Mr. Cook and Mr. Vaughn.

Q. Was anything said at that time concerning the products that you should handle?

A. Yes, Mr. Cook said I should handle Richfield products when I took the station over.

Q. Was anything said as to TBA products?

[fol. 2168] A. I had to handle the Richfield approved accessories. That was definitely understood.

Q. Now, subsequently was there a change in the ownership of the underlying lease, that is, did you acquire the underlying lease at a subsequent date?

A. Yes, I obtained the master lease from the property owner, Mr. Polkinghorn.

Q. That is——

A. That is John Polkinghorn.

Q. About when was that?

A. It was in '42 or '43, as close as I can remember.

Q. I show you, Mr. McRae, a sales contract dated December 2, 1941, between Richfield Oil Corporation, as seller, and Gordon McRae, as buyer, and a painting agreement of the same date; the sales contract on Form 337, print date

6-40, and the painting agreement Form 59, print date 4-41, and ask you if those are the agreements that you entered into at that time.

A. Yes, sir, they are.

Mr. Somerville: The government asks that these be marked for identification.

The Clerk: Government's Exhibits 19 and 19-A, marked for identification.

(The documents referred to were marked Plaintiff's Exhibits 19, and 19-A, for identification.)

[fol. 2169] By Mr. Somerville:

Q. Now, Mr. McRae, at the time that you entered into these agreements, were there any conversations concerning the paint, or the margins, or the operation of the station under the agreement with any Richfield representative?

A. Well, at the time that I signed the paint agreement, why, Mr. Cook at that time told me that if I handled the Richfield products, the tires, tubes, and accessories, their approved products, that they would arrange to paint our station, and they would also give us what we called a kickback, where we received a check of so much a gallon, that would help us pay our rent to the property owner.

Q. Was anything said with respect to whether you could handle other products?

Mr. Paradise: May we have the foundation laid as to time?

The Court: They are talking about the time of the agreements, I suppose.

By Mr. Somerville:

Q. Are you talking now about the time of the agreements?

A. Yes, I am talking about the agreements I made with Richfield at the time I received the property lease from the property owner.

Q. Was it at or about that time?

A. Yes, sir, just within a period of two weeks or so.

[fol. 2170] Who were the parties you talked to?

A. I talked to Mr. Cook and Mr. Martin, who was a branch manager at Santa Monica at that time.

Q. Where did the conversations occur?

A. In the station, at 3016 Main Street.

Q. Were there any other persons present?

A. Mr. Vaughn was there, Benny Vaughn, branch manager of Hollywood, or the manager. He was the district manager, I believe, at that time.

Q. Was there anything said concerning whether you could handle competitive products?

A. They told us we were to use 100 per cent Richfield approved products.

Q. Now, at any time subsequent to this, or at the same time, did you have any conversations concerning putting in a competitive gasoline?

A. Well, within a period, I would say, of 30 days from the time I signed the lease with Richfield, at that time the Standard station across the street was going out of business, so I wanted to handle two types of gasoline, and at that time they told me I could not, that the company had more or less an agreement that they wouldn't——

Q. May I ask who the parties were who made these conversations?

A. Mr. Cook and Mr. Martin. Cook was the merchandiser. Mr. Martin was the branch manager at Santa Monica.

[fol. 2171] Q. Where did these conversations take place?

A. At the service station in Ocean Park.

Q. What was the conversation. What did you say and what did they say?

A. Well, I told them that I wanted to handle two types of gasoline, Standard and Richfield. And Mr. Martin at that time said that the company had an agreement, sort of a gentleman's agreement——

Mr. DeMartini: I move to strike this, your Honor, as to the company having an agreement.

The Witness: I am just saying what Mr. Martin said.

Mr. Somerville: That is just part of the conversation.

The Court: He is saying what he was told. Go ahead.

A. Mr. Martin told me that the companies had a gentleman's agreement that they did not handle what they called split pumps, which is two different types like Standard Oil and Richfield in one station. So they said I would have to either handle Richfield or Standard.

By Mr. Somerville:

Q. What did you do?

A. I naturally stayed with Richfield.

Q. Did you own the pumps or property there?

A. No, sir. The property owner owned everything on the station from the screwdriver right up to the pump. It was one of their first stations. It was one of the few that the property owner equipped with everything.

[fol. 2172] Q. Did you at any time handle any competitive gasoline at that station?

A. No, sir. I have handled Richfield ever since.

Q. Did you handle competitive lubricating oils?

A. No, sir. It was 100 per cent Richfield products.

Q. Now, I call your attention to a service station at 1001 Gayley Avenue in West Los Angeles. Are you familiar with that station?

A. Yes, sir. I leased the station.

Mr. Somerville: May it be stipulated, counsel, that there was a Form 542, print date 9-41, dated January 9, 1942, between Richfield and Gordon McRae?

Mr. Paradise: So stipulated.

Mr. Somerville: May it be further stipulated that there was a subsequent Form 542 lease, print date 4-42, dated May 20, 1943?

Mr. Paradise: Covering the same location?

Mr. Somerville: Covering the same location, yes, sir.

Mr. Paradise: So stipulated, also with Mr. McRae.

By Mr. Somerville:

Q. Did you contact somebody from Richfield Oil Corporation with respect to entering into this lease, the first lease?

A. With the 1001 Gayley?

Q. Yes, sir.

A. Well, I told them that I had always wanted to expand, [fol. 2173] and so at the time that the station came up for lease, why, Mr. Martin contacted me and asked me if I would like to have the station.

Q. Do you happen to know who the previous operator of the station was?

A. Well, the operator about, I would say, two weeks prior to the time that I took the station over was—if I remember, his first name was Bob. It was Bob's Service Station. And he had trouble with the company so he just took all of his accessories, tires and batteries and put them in his truck and just went out of business.

Q. Did he talk to you about it? Did you have any conversation with him?

A. No. I am just telling what I was told.

The Court: Did you see it happen?

The Witness: Pardon me, sir?

The Court: Did you see it happen?

The Witness: No. He told me. He told me what happened. I saw the results. I went down to the service station and the service station was completely stripped of everything that belonged to Bob, and that is the reason they contacted me to take over the station. They knew I had extra equipment, I had hoses and gauges and pumps and grease equipment and everything.

By Mr. Somerville:

Q. Was that station operated during the time that that operator left until you went in?

[fol. 2174] A. From the time the operator left until the time at which I took over, which was a period of, as close as I can figure, was two weeks, it was company operated. The reason I said that it was company operated, because at the time that I took the station over we had lost about half of our customers. And the reason was, Bob had a big sign up for 59 cents for washing and when Richfield took it over they had a standard price that they charged, which was a dollar or a dollar and a quarter. So when Richfield would wash the car they charged the regular company price and the people were all kicking, because they had the big Neon sign up there for 59 cents.

Q. You observed that?

A. Yes, sir.

Q. Were you told by anyone in the Richfield Company that it was company operated?

A. Mr. Martin told me that they had to put company men in for a period of a couple of weeks there to operate it.

Q. That occurred right at this particular time when you were entering into lease arrangements?

A. Yes. Yes, sir.

Q. Was there anything said at that time about what products you would handle at this station?

A. Oh, definitely. They told me I should handle Richfield products, and that I had to handle 100 per cent ap- [fol. 2175] proved accessories and tires and batteries, Richfield approved accessories.

Q. Did you make any investment in that station, put any of your money into it?

A. Do you mean when I first took it over?

Q. Yes, sir.

A. About, as close as I can figure, two to three thousand dollars. I bought my own lube equipment and accessories—I mean the equipment.

Mr. DeMartini: Pardon me. This is the Westwood station?

The Witness: Yes, sir, at 1001 Gayley.

By Mr. Somerville:

Q. At some subsequent time did you act as an authorized TBA distributor for Richfield?

A. Yes, sir. About two years after I was at 1001 Gayley I took over the distributorship for TBA and purchased a truck and started a route.

Q. Did you have any written contract, sir?

A. No, sir. It was a verbal agreement.

Q. With whom did you make those verbal understandings?

A. With the branch manager of Richfield, which at that time was—they had a change about that time, so it was either Johnny Quigg or Buck Moseley, as I knew the boy.

Q. Where did these conversations concerning what you were to do occur?

A. In the station at 1001 Gayley Avenue.

[fol. 2176] Q. What was said with reference to the products you should handle?

A. Well, they said if I was going to be a TBA operator that I had to handle the Richfield approved accessories, tires and batteries, and they gave me a list of all their approved items.

Q. Where did you receive these products?

A. They were delivered to my door. I would write an order out, which usually the merchandiser would take the order, and I believe he sent one to Richfield and the other to Goodyear or whoever they were purchasing the products from.

Q. What was said with respect to the accounts that you would supply?

A. Well, they told us to make the rounds, stop at each station. We would usually stop once or twice a week. Then the merchandiser would usually, every week, would come in and check our order book to see what the service stations were buying.

Q. Did you sell only to Richfield accounts, that is, to those stations handling Richfield gasoline?

A. Yes, sir. My truck only stopped at Richfield stations.

Q. How many, approximately, were there?

A. About 20.

Q. In what area?

A. About 20 and I was in the area of Venice, Santa [fol. 2177] Monica, Beverly Hills, Pacific Palisades, Ocean Park, and Westwood.

Q. You do know the distinction between a leased out type of station and a station under sales and paint contracts?

A. Yes, sir.

Q. Having had both types yourself?

A. Yes, sir.

Q. Did you have stations of both types?

A. I had both types at the same time.

Q. As a part of those original verbal understandings that were entered into on the TBA distributorship was anything said about whether you could handle products,

distribute products to these stations other than the approved?

A. No, sir. They said we had to distribute their approved products or we would lose our TBA distributorship.

Q. Did you make any reports of sales that you made to any Richfield representatives?

A. They would usually drop by and out of our order book take off a copy of each one, which naturally was the same as in the report.

Q. Did you have any discussions with merchandisers concerning the particular competitive situations in service stations?

A. I don't quite follow you on that one, sir.

Q. Did you ever discuss with any Richfield representatives the fact that the particular station handling Richfield gasoline was not buying TBA or was handling com-
[fol. 2178] petitive products?

A. Oh, yes. They would drop in and ask me if I had been stopping at a certain service station, and I would say "yes," and they would say, "Well——"

Q. Who would drop in?

A. The merchandiser from Richfield.

Q. When?

A. Once a week he would drop in, and he would usually check in the order book and he would ask, if there was a certain station that was not buying any tires and batteries, he would ask if I had been stopping there and I would tell him, "Yes," and "They just didn't need anything." And he would say, "Well, we will drop around and see why he is not buying them." And they usually would.

Q. Did you ever ask any representative of Richfield about handling additional lines of products in addition to the authorized products?

A. Oh, several times. I mean we would have things for——

Q. Wait a minute, slow down until we find out who said what and when and where. Who did you have such discussions with?

A. Well, I have discussed with Johnny Quigg and Buck

Moseley and Dick Mahan, several of them that work for Richfield.

[fol. 2179] Q. Where did such discussions occur?

A. At the service station. I would tell them that we had——

Q. Were the discussions of the same general nature or tenor?

A. Yes, sir. I would tell them that we had had several requests for U. S. Royal tires and we would like to supply them to the stations because they have a customer that likes that particular type of tire. And they would say, "Well, I am sorry. You will just have to sell them on the Goodyear tire."

Q. And who would say that, specifically?

A. Well, Mr. Moseley told me several times, Johnny Quigg and Dick Mahan, who was a merchandiser, Mr. Mahan.

Q. Did you hire any men at your station?

A. Yes, sir. I always had two or three in my employ.

Q. What was your payroll average?

A. Oh, I would say five to six hundred dollars a month. I had a fellow that drove the truck. I hired the man that drove the truck and he usually worked just half a day, every day. That is about all the time it would take him to make the service stations, 20 service stations.

Q. Did you have any particular employees with you for any length of time?

A. Yes, sir. I had Mr. Bennett with me, that had been [fol. 2180] with me for—well, I think he worked about four years in that service station with me at the time.

Q. Did you subsequently go into the service, Mr. McRae?

A. Yes, I went in the service after I had had the station about three years.

Q. Did you continue to have the lease from Richfield?

A. Well, at the time I went into the service, why, Richfield told me that they would have to check me out.

Q. Were there any discussions relating to the exercise of the 24-hour clause at the time you were ready to leave for the service?

A. Yes, sir. When I went in the service, why, I wanted to keep the service station and Richfield told me, Mr.——

wait a minute. Johnny Quigg of Richfield Oil Corporation told me——

Q. Where?

A. At the service station.

Q. What was the time, sir?

A. What was the time?

Q. Yes.

A. The time was—what do you mean, the day?

Q. Well, no, but when did you go into the service?

A. Oh, in '44, in about December of 1944. Johnny Quigg came in the station and he told me that he would have to take the service station over because I was going [fol. 2181] in the service. And I told him, "Well, I figured I could still run it while I was in the service." And at that time he said, "Well, we have a 24-hour clause and we feel you can't run it in the service and we will have to take it over."

Q. Did you turn over possession?

A. Well, I told him that—well, we discussed this. This had been off and on for about a period of three months. And so finally—well, we had quite an argument on it and I threw him off the lot. And he told me that he was going to check me out. So I said, "Well, why don't you wait until the end of the month?" That was about the first week in the month. So he says, he says to me, "Okay, we will wait until the end of the month." And I said, "Well, I am not going in the service until the end of the month." Well, actually, I was going in the service within three days. So when he come back I was already in the service.

Q. Where did you go?

A. They sent me to Ft. MacArthur.

Q. Before you left did you make any arrangements for the operation of the station?

A. Yes. I told the help—I hired help and I hired a bookkeeper to make out the final checks, and I told them if they said anything about the 24-hour clause to not pay any attention to it, because I looked towards it that going into the [fol. 2182] service was just like an act of God and not to pay any attention to the 24-hour clause.

Q. Who did you leave in charge of that station?

A. I left Mr. Bennett in charge of the station and I left two men and Mr. Polkinghorn, and then a bookkeeper.

Q. Did you make arrangements for receiving regular reports on the operation of the station?

Mr. Paradise: Oh, I submit that this is immaterial.

Mr. Somerville: I will withdraw that question.

Q. Subsequently was there any further effort made to get you out of that station?

A. Yes, sir. After I was a week in Ft. MacArthur, why, Dick Mahanm of Richfield brought a summons in there and gave it to be at Ft. MacArthur to appear in court. And they——

Q. Subsequently did you experience any difficulties with respect to obtaining supplies of gasoline?

A. Well, at that time Richfield said that they were going to come down and check me out.

Q. Are you talking about Mr.——

A. Yes, I am talking about Johnny Quigg. He said he would be down and check me out.

Q. When did he say that?

A. He telephoned my men that were working at the service station and told them he would be down in the morning to check them out.

[fol. 2183] Mr. Paradise: Just a moment.

The Court: Just a moment. That will be stricken. You cannot testify to what he told them. That is stricken.

Mr. Paradise: I would like to make an objection to this entire line of testimony. While it is apparently a very sad story, I do not see that it has anything to do with an anti-trust case and submit that this is immaterial.

The Court: It is the manner of terminating these agreements. All right, go on if you know. When were you checked out? Let us not go over your troubles. When were you checked out?

The Witness: Out of the service station?

The Court: Yes.

The Witness: Well, about, as close as I can figure, it was in '46.

The Court: All right.

Mr. Somerville: Well, I think that is all for the present.

The Court: All right.

Cross examination.

By Mr. DeMartini:

Q. Referring to the original sales contract that you made on the Ocean Park station, Mr. McRae, which is Government's Exhibit 19, that is dated December 2nd, 1941. That was entered into after you acquired title to the property, is that correct?

[fol. 2184] A. Yes, sir.

Q. In other words, there was then a change in your method of operations from an L-O operator to sales contract dealer, is that correct?

A. That is right, sir.

Q. At the same time you entered into a paint agreement which is also dated December 2nd, 1941, is that correct?

A. That is right, sir.

Q. At that time the station was painted in Richfield colors, was it not?

A. That is right, sir.

Q. Did you request the paint agreement in connection with the execution of the sales contract?

A. No. When we signed the lease, why, that is customary that you sign a lease that Richfield repaints the station.

Q. Did you have any conversation with respect to painting at this time?

A. Yes, sir, we did.

Q. What was that conversation?

A. I had conversation with Mr. Cook at the time—I believe it was Mr. Cook, the merchandiser, and I also talked with Mr. Martin and told him that I would be willing to handle Richfield products but I wanted the station painted. I had to have it looking nice, being so close to the beach [fol. 2185] air, naturally it rusted up quite a bit.

Q. That is what I mean, you asked that the station be painted?

A. Yes, sir. That is right, sir.

Q. You understand the difference between an L-O operator and a 337 dealer, having occupied both functions, do you not?

A. Well, what way do you mean? I know the two different types.

The Court: That is merely a preliminary question.

A. Yes, sir. I know the two types.

By Mr. DeMartini:

Q. In connection with the L-O station you understand that there is a 24-hour termination privilege in the lease?

A. Yes, there is one. There was one at the time. I don't know whether there is now.

Q. There was one at your time?

A. Yes, sir.

Q. What did you understand was the nature of that 24-hour privilege? What was it in there for?

A. Well, to me and to everyone that has operated that I ever talked to, it was more or less a leverage that if you don't handle certain types of products, which I had been told hundreds of times, why, they would check us out in 24 hours.

Q. Well, you were also required to keep the station [fol. 2186] clean, to wear uniforms and to keep certain hours, were you not?

A. Well, we didn't—they were not as interested in that. They checked us and asked us once in a while, yes. I don't think they would walk in the restrooms once in every three or four months.

[fol. 2187] Q. But they did have merchandisers call on you?

A. Yes, he would call.

Q. They would check the restrooms, irrespective——

A. Well, very seldom. They were more interested in checking our products, to see what we were handling.

Q. This investment of two or three thousand dollars that you put into the Westwood station, what did it consist of?

A. Well, I bought out the tires, and tubes, and batteries, and my equipment, and my lube cabinet, and washrack equipment, you know, everything that it would take to operate a service station, air gauges, and stuff like that.

Q. When you gave up that station finally, did you sell the merchandise located in the station with the gasoline and oil and approved TBA to the incoming operator?

A. Yes, sir, I did, excepting I had some A-C spark plugs, and like that, that I had under the counter. That I took with me. They said he didn't have to buy them.

Q. In connection with the TBA operation, which you had in 19— was it 1942, Mr. McRae?

A. I think it was '43, as close as I can figure.

Q. What did you handle? What types of TBA?

A. Well, I handled Goodyear tires, Goodyear batteries, Champion spark plugs, and at that time they had mops and floor polishes, and brooms, and——

[fol. 2188] Q. You didn't have to sell most of that stuff, did you?

A. Pardon, sir?

Q. You did not have to sell it, did you?

A. Well, I sold it at the service station, and I also delivered it to the others.

Q. What I mean is, it did not require any sales effort to get rid of it, did it, in 1943?

A. Well, it always did. As long as I was in business, yes, sir, it did, because we always had within a block of us a Western Auto or a Pep Boys that could undersell us.

Q. In 1943? You are speaking of 1943, are you?

A. Yes, sir.

Q. Do you mean that dealers were not prorated or rationed as to tires and wanted more than you could possibly supply them, or that you were given certain quotas of tires and batteries?

A. You are asking me in '43. I had many a man, and some of them were movie stars, but what they would leave their car in my service station and walk down the street to Western Auto or Pep Boys and have a battery delivered to their car.

The Court: That didn't start until 1944. The government didn't ask us to turn in the extra tires until 1944. I happen to know, because they rationed me a little Plymouth [fol. 2189] at the end of 1942, and it was a year and a half afterwards that they began turning in the tires. I happen to know because the reporter here from the Times asked me to act as a demonstrator so that they could take a picture of me beside the little Plymouth in the act of doing the things you are supposed to do before you turn them in.

By Mr. DeMartini:

Q. Well, anyway, with respect to your TBA operations, you acted as a seller of those products to the various stations?

A. That's right, sir.

Q. And that was your sole purpose?

A. That's right.

Q. You did not have any control or direction over any of those stations?

A. Well, we owned the trucks, and we owned the products, and we bought them and delivered them to them. I would say that was some control.

The Court: You mean you had an interest——

The Witness: That's right.

The Court: —in disposing of the products because you had been charged for them?

The Witness: That's right.

The Court: And you wanted to make a profit, in that the business didn't just run itself?

The Witness: That's right.

[fol. 2190] By Mr. DeMartini:

Q. Did you ever tell an L-O operator he had to buy from you?

A. Yes, we told him. Do you want me to tell you what he told me? I wouldn't tell it in court.

Mr. DeMartini: That is all, Mr. McRae.

The Court: Any further questions?

Mr. Somerville: No questions.

The Court: Step down.

(Witness excused.)

The Court: Call you next witness.

Don McCombs, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?

The Witness: Don McCombs.

The Clerk: M-c-C-o-m-b-s, Don?
The Witness: Right.

By Mr. Hall:

Q. Where do you reside, Mr. McCombs?
A. At Kooskia, Idaho.
Q. Would you mind spelling that for the reporter, please?
[fol. 2191] A. K-o-o-s-k-i-a.
Q. And your present occupation?
A. Farmer.
Q. Did you ever lease a station for the operation of a gasoline service station in Spokane, Washington?
A. Yes, sir.
Q. And when?
A. I took it over September 1, 1941.
Q. Will you state with whom you first discussed the obtaining of this lease with Richfield?
A. Lloyd Ek, the man that was in the station.
Q. But did you discuss it with any Richfield representative?
A. Yes, Pep Hagin and Earl Winn.
Q. And this was before the lease was signed?
A. Yes, sir.
Q. What discussions did you have with them?
A. Well, I told them I would like to have the station when Ek left, and that I had four and a half years' experience with Standard Stations and felt that I could do a good business there.
Q. Did you have any discussion with them at that time relative to the products that should be handled, or the manner in which the station should be operated?
A. No, I didn't ask them, but they told me.
[fol. 2192] Q. What did they tell you?
A. That I should sell Richfield petroleum products and any accessory items I bought should be bought from Colyear Motor Sales.
Q. Who were Colyear Motor Sales at that time?
A. A jobber that had a tie-in with Richfield.

Mr. Hall: Will you stipulate that Mr. McCombs occupied this station under three forms of 542 leases?

Mr. DeMartini: Yes, it will be stipulated that he occupied the station under an L-O lease, form 542, dated September 1, 1941, bearing print date 3-41; the second lease dated January 21, 1942, bearing print date 3-41; and a third one dated April 1, 1942, bearing print date 5-41, and one dated March 27, 1947, bearing print date 3-46.

Mr. Hall: That is right.

By Mr. Hall:

Q. When was the first time, Mr. McCombs—first you entered into a lease with them after these discussions with Mr. Hagin and Mr. Winn?

A. That's right.

Q. And you occupied the station until about what date?

A. Until July 1, 1949.

Q. 1949?

A. Yes, sir.

Q. Will you tell us the first time you ever had any difficulty or experiences with any of the Richfield representa-[fol. 2193] tives relative to the products that you were handling?

A. Well, the first instance I remember was, I believe, early in 1945.

Q. What was that instance? First, what did it concern, —what product?

A. Quaker State chassis lubricant.

Q. And what Richfield representative made any objection to you about it?

A. A merchandiser by the name of Jack Emerson.

Q. What were the circumstances surrounding that experience?

A. Well, I had ordered 50 pounds of Quaker State chassis lube, and Mr. Emerson came in and saw it in the lube room.

Q. What did he say to you?

A. Asked me to come into the office, he wanted to talk to me.

Q. What did he say to you when you got in the office?

A. Asked me where I got that stuff.

Q. What did you say to him?

A. I told him I bought it from Cruz Oil Company.

Q. Did you tell him why?

A. Yes, sir.

Q. What did you tell him? Tell us the conversation you [fol. 2194] had with Mr. Emerson on that occasion.

A. Well, he asked me why I had it there, and I told him it was necessary to have a lighter grease than Richfield could furnish during the cold weather. And he said, "Well, you get that out of here, and we'll get you something you can use."

Q. Was that all of that particular incident?

A. Well, he said——

Q. Did he make any other statements?

A. He said, "I have a notion to check you out of here right now."

Q. Anything else at that particular time?

A. I don't recall anything definite.

Q. Now, was there any other time—did you ever have any trouble with Mr. Emerson about lubricants or motor oil?

A. Well, he knew that I had competitive oils in small quantities, but he asked me to keep them out of sight. There was no real trouble over it, no.

Q. What competitive oils did you handle?

A. Quaker State, Conoco, Ring-Free.

Q. Is that MacMillan's Ring-Free?

A. Yes, sir.

Q. What did he actually tell you about those oils that you had in there?

A. Well, he said to keep them out of sight, and at [fol. 2195] intervals of maybe every six months or once a year he would drop in and say to be sure to get them out of sight and to clean up the station, that the big shots from Seattle were coming.

Q. And how often was that?

A. Well, it was whenever they came over; possibly every six months or a year.

Q. Did he tell you why he wanted you to clean up, because the big shots from Seattle were coming?

A. Well, he asked me to hide the oils, so that they wouldn't see them, and he wouldn't get into trouble I suppose.

Q. Were you carrying any other competitive or off brand

merchandise, or merchandise that was not approved by Richfield at the time?

A. Yes, quite a few items.

Q. Did he ask you to put that away, too, when the big shots were coming?

A. No, not the shelf stock in the sales room.

Q. Will you tell us the incident you had relative to Lincoln batteries? First, when did you first start to stock Lincoln batteries?

A. Well, I can't say exactly, but it was possibly in '43 or '44, when Goodyears became hard to get.

Q. When was the first time that Richfield ever objected [fol. 2196] to your handling Lincoln batteries?

A. When the supply of Goodyears improved. I can't tell you just when that was.

Q. When was that? Would it be '44, '45, '46?

A. I don't believe it was before '45. It must have been in '45.

Q. Who made the complaint to you?

A. Mr. Emerson.

Q. I can't hear you.

A. Mr. Emerson. Mr. Emerson.

Q. Mr. Emerson. What did he say to you about the Lincoln batteries?

A. He said that now that Goodyears were available, they would expect me to sell out my stock of Lincolns and not replace any of them.

Q. What did you tell him?

A. I told him I preferred to keep selling them because there was a better margin on them, easier to sell.

Q. Did you make up a chart for his examination, to show the differences between the prices that you received, and your discounts, and the guarantees, as between the Goodyear batteries and the Lincoln batteries?

A. I made up a chart; not especially for him.

Q. Did you show it to him?

A. I couldn't say I showed it to Mr. Emerson.

[fol. 2197] Q. To whom did you show it at Richfield?

A. I showed it to Ivan Matthews and Al Cloninger.

Q. What reasons did you give to any of these gentlemen

for handling Lincoln batteries in preference to Goodyear batteries?

A. The Lincoln batteries had a longer guarantee, and I could sell them cheaper, and it had a wider margin of profit.

Q. I will hand you this paper, and ask you if that is the comparative chart that you used to explain to these Richfield gentlemen the differences in price.

A. Yes, sir.

Q. Will you select from that paper one of the best sellers of comparable items and compare the price at which you could sell a Goodyear battery and a Lincoln battery?

A. Well, the Goodyear battery that had a 27-month guarantee was comparable to the Lincoln battery that had a 30-month guarantee.

Q. What would the price to the customer be, of the Goodyear battery?

A. $26.45 was the price Goodyear set in their price list.

Q. What was the price to the customer of the Lincoln battery?

A. I sold it for $19.95.

[fol. 2198] Q. What margin of profit was there in it for you on the Goodyear battery?

A. $5.78.

Q. What was the margin of profit on the Lincoln battery?

A. $6.86.

The Court: What was the upshot of the conversation? What did they say?

The Witness: Well, they said I had a point there.

The Court: Ultimately what happened?

The Witness: Well, they kept——

The Court: What finally happened?

The Witness: They kept at me to eliminate the Lincolns until it came to a climax in May of 1949.

The Court: What did they do?

The Witness: Well, Richfield put on a sales contest. They required that I buy Goodyear batteries in order to fill the quotas that were expected of me.

The Court: So you bought them?

The Witness: So I bought them.

By Mr. Hall:

Q. When you checked out of this station in July of 1949, did you have any of these batteries on hand, these Lincoln batteries?

A. Yes, sir.

Q. How many?

[fol. 2199] A. I had 22 on hand.

Q. Will you explain to the court the circumstances relative to what happened to those Lincoln batteries when you transferred the station over?

A. Well, the man that was going to buy me out came out to the station to talk to the merchandiser.

Mr. Paradise: If this calls for conversations, I would like a better foundation laid, if the court please, as to time and place, and parties present.

The Court: We are talking about the time of his checking out.

The Witness: That was in June, 1949.

The Court: All right. Go ahead. Who was the merchandiser?

The Witness: The merchandiser was Al Cloninger.

The Court: And the buyer, the man who was following you?

The Witness: L. F. Rhodes.

The Court: Go ahead.

The Witness: Ivan Matthews was already there.

By Mr. Hall:

Q. Tell us the conversation that went on at that time.

A. Ivan told——

Q. Ivan Matthews?

A. Ivan Matthews told Lou Rhodes, L. F. Rhodes, that [fol. 2200] after I left there there were to be no Lincoln batteries in the station, and he was to sell Goodyears.

The Court: Did you get credit for the value of the invoices on these off brand——

The Witness: No, sir.

The Court: —on the off brand items?

The Witness: No, sir, I didn't.

The Court: What did you have to do with them?

The Witness: I had to get them out of the station.
The Court: Oh, you took them with you?
The Witness: Yes, sir.

By Mr. Hall:

Q. Did you take the batteries with you?
The Court: How did you happen to have so much money invested in batteries?
The Witness: Oh, the batteries sold good.
The Court: I mean, did you have to stock them?
The Witness: I bought them in 25 lots because of an extra five per cent discount, a quantity discount.
The Court: Oh, I see. I didn't know anybody bought in large quantities. Even the biggest stations are content with three, four, or five.

By Mr. Hall:

Q. What happened to those batteries?
A. When I sold my home in Spokane and left town, I had to store them some place, and I got permission from Mr. Rhodes to store them in the basement of his home.
[fol. 2201] Q. That was your successor in the station?
A. Yes, sir.
Q. Did he help you dispose of them?
A. I stored them there, and he helped me to dispose of most of them.
Q. Did you suffer any loss on them?
A. Yes. I sold them for cost, or less.

Mr. Hall: Will counsel stipuate that the Mr. Rhodes he mentioned is the Lou F. Rhodes who testified relative to this same station last week?
Mr. Paradise: I don't know.
Mr. Hall: The record will show that.
The Court: All right.

By Mr. Hall:

Q. What spark plugs did you handle, Mr. McCombs?
A. Champion.
Q. Are those a Richfield-approved item?
A. Yes, sir.

Q. Did you ever have any trouble with Richfield relative to handling any Champion spark plugs?

A. Yes, sir, I did.

Q. Who made the criticism to you?

A. A Mr. McBride.

Q. What did he say? First, when was it?

A. It was in February of '47.

Q. What did he say to you?

A. No—yes, that is right, '47.

[fol. 2202] Q. What did he say to you?

A. He wanted to know where I was buying my spark plugs, since it didn't show in Richfield's records that I bought any great amount from them, while I had about 700 on hand.

Q. What did you tell him?

A. I told him I bought them from another jobber because I got a better price on them.

Q. How much better price did you get from the other jobber rather than from the regular Richfield distributor?

A. I could buy them in smaller quantities at six cents a piece less.

Q. Did you give him that information?

A. Yes, sir.

Q. What did he say?

A. He wanted to know the name of the jobber.

Q. What did he say he was going to do about it?

A. He said he would see that they lost their franchise over selling them in small quantities at the large quantity price.

The Court: Gentlemen, for the record, I will say that the record shows—my own recollection is to the same effect—but the record shows that Louis F. Rhodes succeeded this gentleman whose station he talks about. He testifies on page 454 of the record that he approached some of the Richfield men and told them he wanted to lease the station [fol. 2203] from them, buy the station from Don McCombs.

Mr. Hall: Thank you, your Honor. And I believe I am correct that he stated or testified that he took over a certain number of these batteries and sold them.

The Court: Oh, yes. In fact, on page 454 he states:

"And he said that would be all right. But he did object to me buying some of Don McComb's merchandise."

Then the question is: "What did he say?"

"A. He said I couldn't buy Don McComb's 14 Lincoln batteries which were in stock at that time."

And then there was some conversation between Mr. Hall and the court and then he said:

"Were those batteries in the station at the time?

"A. Yes.

"Q. Do you know whether or not Mr. Cloninger or any other Richfield man had caused any trouble about those 14 Lincoln batteries?"

He didn't know about it. However, it is quite apparent that this is the same station that we are talking about.

Mr. Hall: I would say the address is the same, your Honor.

The Court: All right.

By Mr. Hall:

Q. What filters did you handle in the station?

[fol. 2204] A. Mainly Frams.

Q. And did anyone from Richfield ever object to your handling Fram filters?

A. Yes.

Q. Who?

A. Jack Emerson, Al Cloninger, Brown, Neff, all merchandisers.

A. At the time you transferred the station to Mr. Rhodes was there anything done relative to the Fram filters?

A. They asked him not to buy them from me.

Q. Did he buy them from you?

A. No.

Q. What did you eventually have to do with those filters?

A. I got the Fram dealer to take them back at a discount.

Q. Did that result in a net loss to you from what you had had to pay for them?

A. Yes, sir, five per cent—ten per cent it was.

Q. What fan belts did you handle?

A. When?

Q. Well, let's say the year 1949.

A. In '49 I was handling Goodyears.

Q. What did you handle prior to that?

A. Thermoids.

[fol. 2205] Q. Did any Richfield official make any objection to your handling those?

A. Yes, sir.

Q. Who?

A. Mr. McBride, especially.

Q. About when?

A. February '47.

Q. What did he tell you about it?

A. He told me to replace them with Goodyears, sell them out and replace the stock with Goodyears.

Q. Did he make any other statement to you at that time?

A. Well, to take the rack down that said "Thermoid Fan Belts" on it.

Q. Was the driveway in this station in good, usable condition at the time you got into the station? Were you in therein 1941?

A. Not too good, no.

Q. Did you make complaint to Richfield about the driveway?

A. The next winter, yes.

Q. What was the effect of any defect in that driveway as far as your operation of the station?

A. Well, when it rained the downspout filled this depression.

Q. Where was this depression?

[fol. 2206] A. Right at the entrance to the driveway.

Mr. Hall: Will you mark this for identification?

The Clerk: Government's Exhibit 20 marked for identification.

(The document referred to was marked Plaintiff's Exhibit 20 for identification.)

By Mr. Hall:

Q. Did you make any complaint to Richfield from time to time?

A. Yes, sir.

Q. Of that?

A. Over a period of eight years.

Q. Over a period of eight years. Was it ever fixed?

Mr. Paradise: Again, I say that this is immaterial, your Honor. We seem to be trying every type of case except exclusive dealing.

The Court: Just a minute.

Mr. Hall: Only to the extent, your Honor, of the testimony that has been brought out previously in this case relative to investment and the way they kept up the station. I just wanted to show that this man for eight years could not get a replacement fixed there, that is all. That is the only purpose it had.

Mr. Paradise: Is that what we are being accused of in this lawsuit?

Mr. Hall: No. It is not a matter of fairness. It is a matter of investment.

[fol. 2207] The Court: No, no. The only thing we are interested in is control and the means of achieving it, and the other things are not material. I will sustain the objection to any further inquiry.

Mr. Hall: Well, that ended it. That was the last question I had on it.

The Court: All right. Then it becomes an ultimate question by striking it out.

The Clerk: Exhibit 20 is withdrawn.

The Court: It is all up to you, we will adjourn as soon as you finish.

Mr. DeMartini: All right.

Cross-examination.

By Mr. DeMartini:

Q. Mr. McCombs, the only trouble that you had with Richfield was not with respect to competitive merchandise, was it?

A. No. They asked me to operate longer hours at times.

Q. They also asked you to keep a clean station, didn't they?

A. Yes, sir.

The Court: How large a town is this?

The Witness: Spokane?

The Court: Oh, you were in Spokane?

The Witness: That is where the station was.

[fol. 2208] The Court: I thought it was across the line.

The Witness: The station was in Spokane. I live in Idaho now.

The Court: Oh, I beg your pardon.

The Clerk: Defendant's Exhibit J marked for identification.

(The document referred to was marked Defendant's Exhibit J for identification.)

The Court: I would insult Spokane by asking a good friend. That is big enough to have a Federal Judge there all the time, the Eastern District of Washington, Judge Driver. But I got your residence, your present residence lingered in my mind because of the Indian name of the town.

By Mr. DeMartini:

Q. You are familiar with Form 205, are you not, Mr. McCombs?

A. Not by form number probably.

Q. It is entitled "Survey of Station Operations."

A. That is right.

Q. This one is dated January 29, 1948. It bears your signature, is that correct?

A. Yes, sir.

Q. And the signature of Mr. Neff, doesn't it?

A. Yes, sir.

Q. It has opposite—do you understand what the letters "S U C" and "TBC" mean?

[fol. 2209] A. Well, that is "Satisfactory" and that is "Unsatisfactory" and that is "Corrected", I believe, and that is "To be corrected."

Q. Yes. Now, I will show you opposite the item entitled

"Maintenance scheduled" the letter "U" is checked and the letters "TBC" are checked. Is that not correct?

A. Yes.

Q. And the same is true of "Building exterior clean", "Building interior clean," "Condition of paint," "Yard and driveways," "Planting area," "Adjoining area," "Windows clean," "Signs clean," "Pumps clean," "Floor clean," "Toilet bowl clean," "Wash basin clean," "Seat covers," "Coat hooks," etc. That is correct, they were all marked "Unsatisfactory" and "To be corrected," is that correct?

A. Yes. May I explain this?

Q. Yes, you may.

A. That was previous to a paint job which the company does.

Q. But there are items on here with respect to restrooms that indicate that they were unclean?

A. Yes, sir.

Mr. DeMartini: I will introduce this into evidence.

The Court: All right.

Mr. Hall: Your Honor, the only thing I have to say, it has no more bearing than the broken pavement. I can say [fol. 2210] I have no particular objection.

The Court: No, it has bearing with the cause of the dissatisfaction. There is evidence from which it will no doubt be argued that one was used as an excuse for the other, so the two are related. You notice Mr. DeMartini did not object to your inquiry about the depression there in the pavement. He objected when you went into details about the number of years it took him to get it repaired.

The Clerk: Is this admitted, then, your Honor?

The Court: Yes, it may be received.

The Clerk: J in evidence.

(The document referred to was marked Defendant's Exhibit J and received in evidence.)

The Court: I have traveled a good deal all over the Pacific Coast. I will say if they police—not only this group but all stations, all of them—if they police the restrooms it would be much better for the traveling public.

Mr. Hall: I agree with your Honor it would be.

The Court: I note in going up and down the entire coast in March it has gotten so I would have to carry soap and towels right in the compartment of the car, because half of the time you would go in there and there would not be any. They would have containers. The soap containers would be empty and most of the time they would not have any paper, and some of the small stations locked them for that reason. They claimed in that way they kept control over [fol. 2211] them. So it is an important item. All right.

By Mr. DeMartini:

Q. Instead of going into the details of these rental changes, Mr. McCombs, I will just ask you. There were several rental changes in your rentals, reducing them from time to time and increasing them from time to time, depending upon conditions, is that correct?

A. Yes, sir.

The Court: Under what form were you operating at the time of transfer to Rhodes? Under what form were you operating?

The Witness: I——

By Mr. DeMartini:

Q. You were always under an L-O form of lease?

A. Yes.

The Court: The same type?

The Witness: The same form.

The Court: That was prompted by what you said in change of rent?

The Witness: Just the basic rent was changed.

The Court: You had an L-O form?

The Witness: Yes, sir.

The Court: All right.

Mr. DeMartini: That is all.

The Court: That is all. Step down.

[fol. 2212] Mr. Hall: I have no witness at this present time.

The Court: That is good. I would not let you in with one now, anyway.

Mr. Hall: I am awfully glad you would not.

The Court: Gentlemen, I will defer to your wishes in the matter and it will be understood that when we finish tomorrow, that this case will be continued until Tuesday. So I thought I would let you know now.

Mr. Paradise: Thank you, your Honor.

Mr. Dixon: May it please the court, before we adjourn, may the Government request permission to withdraw some of the exhibits from the record or from the custody of the clerk for the purpose of making photostats?

The Court: That is all right. Mr. Childress has full authority to do that.

Mr. Dixon: Thank you, your Honor.

The Court: For making photostats.

The Clerk: Your Honor, that same request was made by the defense, too. Would that be permissible?

The Court: They have the same opportunity.

The Clerk: To remove them actually physically from the building. It means nothing to us.

Mr. Paradise: It does not matter particularly, your Honor. We have our own photostatic department.

The Court: Why don't you patronize the Government? [fols. 2213-2216] You are so nice to each other, why don't you patronize the Government? Incidentally, I do not know whether he has any paper or not. I think he has run out of paper because I am waiting for some.

Mr. Paradise: Thank you. We can do that just as well.

The Court: The clerk's office has very good equipment. I think their charges are within the range of other prices, what they charge officially. At any rate, if you want to take them out, why, it is your responsibility and you can give Mr. Childress any required receipts. You may supply him with any receipts he may request for the sake of the record, because he is responsible for them.

All right, gentlemen. Then we will see you tomorrow.

(Whereupon, a recess was taken until 10:00 o'clock a. m. of the following day, Friday, May 18, 1951.)

[fol. 2217] Friday, May 18, 1951, 10:00 A. M.

The Court: All right, cause on trial.
Mr. Hall: Mr. DeLonge.

ROBERT J. DELONGE, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: Robert J. DeLonge.

Direct examination.

By Mr. Hall:

Q. Where do you reside, Mr. DeLonge?
A. Olympia, Washington.
Q. What is your present occupation?
A. I am a plywood producer or plywood worker.
Q. Were you ever the lessee of a gasoline service station selling Richfield products?
A. Yes.
Q. When did you first enter into the operation?
A. September 1st, 1946.
Q. At what address?
A. 404 West Fourth Street, Olympia, Washington.
Q. Will you tell us the circumstances just immediately prior to your going into the station, who you talked with in Richfield?
[fol. 2218] A. I worked previously for a man by the name of Fred West who was an operator of a Richfield service station for several months, and during the time I was working for Mr. West I indicated my desire to find a station of my own. Mr. Orville Kaiser——

Mr. Paradise: I must object to the witness' conclusions.
The Court: Yes.
Mr. Paradise: I think counsel should call for conversations and lay foundation.
The Court: Tell us what was said.

By Mr. Hall:

Q. Who did you first contact?

A. Mr. Kaiser, the distributor there, Mr. Orville Kaiser, the local distributor.

Q. Was he also the TBA distributor for Richfield?

A. Yes, he was.

Q. What was the conversation between you and Mr. Kaiser?

A. I told Mr. Kaiser that I would like to have a station of my own. And he asked me if I would like to have the station in which I was working. I told him that I didn't care for it. So he told me that there was a station soon going to be opened at 404 West Fourth Street, the Olympia One-Stop Service, and he asked me if I would like to have that one and I said, "I certainly would." He told me to go down and look it over and talk with the boys that were operating it and see what I could do about it.

[fol. 2219] Q. And did you subsequently have any further conversations with the Richfield men after you had talked to the men at the station?

A. Yes, I did.

Q. Were you desirous then of going into the station?

A. Yes, I was.

Q. Then who did you talk to?

A. I talked to Mr. Kaiser and the sales representative. I can't remember his name at the present time because he left the district right shortly after I was in there. But Mr. Kaiser——

Q. What did you tell Mr. Kaiser? This was not Mr. Dinsmore, was it?

A. No, it was not Mr. Dinsmore. I told Mr. Kaiser that the boys down there wanted to sell, all right, and that they wanted a pretty steep price for the place. And he asked me how much they wanted and I told him that they had told me that each one of them wanted $3,000. That was $6,000 for the place. Mr. Kaiser told me that was too much money and if I would wait a week, I could go in there for nothing.

Q. Was there anything further said at that time?

A. Yes. I told Mr. Kaiser I didn't want that kind of a deal, that I expected to do business there after I had pur-

chased it and I didn't want any bad reputation, as I didn't want those boys going out and saying that they had been [fol. 2220] robbed of their business and I had taken it over. I didn't want to be responsible for that. And he said, "Well, suit yourself, but you could have bought a lot cheaper than that." So we dropped the conversation there.

Q. What was the next step in this procedure?

A. I had another conversation with Mr. Kaiser and told him that I had made arrangements to buy one of the partners out for $3,000. And he said, "Well, that is okay with me but I don't know what you are buying, but go ahead." So I gave the man a check for $3,000 in cash and assumed a half interest in the place of business.

Q. And when did you go into operation of that business?

A. September 10th I became a legal part owner of the place.

Q. And when did you execute a lease with—first, I will ask you did you execute any lease with Richfield at that time?

A. No.

Q. When did you execute a lease with Richfield?

A. On October 29th, 1946 is the closest recollection I have.

[fol. 2221] Q. I will hand you this paper, and ask you if that is the lease that you executed with the Richfield Oil Corporation.

A. The lease, minus this top part, is the original lease.

Q. Yes.

A. Yes, sir, that is.

Q. By that time this was just signed by yourself, and you partner is not existent in that arrangement; is that correct.

A. No, not at the time this lease was consummated.

Mr. Hall: Will counsel stipulate that this was executed on Form 542, print date of 11-45, between Richfield Oil Corporation and Robert J. DeLonge, dated the 29th day of October, 1946?

Mr. Paradise: Yes, on an L-O form.

By Mr. Hall:

Q. Now, did Mr. Kaiser, or any other Richfield representative, make any statements to you as to the manner in which you should operate that business?

A. Mr. Kaiser told me it was to be my own place of business, and I was my own business manager, and as long as I operated it to the benefit of the Richfield Oil Corporation, I would be able to do as I pleased there.

Q. After you went into the station did you have any difficulties with Richfield Oil or any of its representatives, [fol. 2222] relative to the operation of that station?

A. Yes, sir, several.

Q. Calling your attention to the matter of the hoist, the lubricating hoist——

A. Yes, sir.

Q. Will you tell us the circumstances relative to that?

A. The lubricating hoist was an old electric hoist that had been in the place ever since it was built, and was very badly worn out, and shortly after I took over the place an employee of mine was greasing a car on it, and the cables broke and let the car down, and damaged the car to a very serious extent, and I was without a hoist.

Q. Did you take this matter up with the Richfield people?

A. Immediately.

Q. To whom did you talk?

A. Mr. Kaiser.

Q. And what did he say?

A. He told me he would be right down to look at it, and not move anything on the hoist, and said he would be there within 10 minutes. I waited until—that happened about 2:00 o'clock in the afternoon, and I waited until after 7:00 that evening, and no one had shown up, so I had to take the man's car off the hoist with a wrecker, and send it to a [fol. 2223] repair shop to get it fixed.

Q. When did Mr. Kaiser show up?

A. He showed up about 7:00 o'clock that evening.

Q. What was that conversation?

A. He came in and looked at it, and he said, "Well, that's pretty badly wrecked, isn't it?"

I said, "It surely is."

He said, "Well, tomorrow I will get a man down here to give us a bid on fixing it up."

And I said, "You don't need to fix it up for me, because I absolutely refuse to let a man use that hoist any more. It's not safe for life, nor property."

And he said, "Well, it can be fixed. It can be fixed."

I said, "No, sir, it isn't safe, and I don't want it fixed. I want a hoist in there to do my work on in safety."

He said, "Well, that's the only thing I can do for it, is fix it up."

Well, I said, "I had better see somebody else, then." I said, "Who is the next person I should contact?"

He said, "Well, you will have to contact Richfield Oil representatives."

Then I called Mr. Dinsmore——

Mr. Paradise: I think you have answered the question.

The Witness: Thank you.

Mr. Hall: I asked for the conversation.

[fol. 2224] The Court: He is telling the whole chronicle of events. That's all right. Go ahead.

By Mr. Hall:

Q. Did you call Mr. Dinsmore?

A. I called Mr. Dinsmore, yes, sir, and Mr. Dinsmore didn't show up for about three days, and when he did come down, he said, "Well, that's not our responsibility. That hoist doesn't belong to Richfield. That belongs to the building owner. You will have to see the building owner for anything about that."

So that was the end of that conversation.

Q. Well, did Richfield ever replace the hoist?

A. No, sir.

Q. How long were you operating the station without a hoist?

A. Nearly three months.

Q. Was a new hoist eventually placed on the property?

A. Yes, sir.

Q. And who purchased it?

A. I did.

Q. How much did you pay for it?

A. $325 for the hoist, and then about $75 to install it.

Q. Were you ever repaid for that?

A. No, sir.

Q. During that period of time that you didn't have a [fol. 2225] hoist, how were cars lubricated?

A. We had to lubricate them with floor jacks.

Q. Did you also have any trouble with the steam cleaning hoist?

A. Yes, sir, the steam cleaning hoist was bad.

Q. That was a separate hoist from the lubricating hoist?

A. Yes, sir.

Q. What happened to that hoist?

A. I had to fix it myself.

Q. Do you recall what the cost of that was?

A. I think it was about—I can't say just exactly, but I think it was about $125.

Q. Did you take it up with any of the Richfield officials?

A. Yes, sir, I went through the same routine as I did on the first one.

Q. What did they say to that?

A. That the hoist did not belong to them, it belonged to the property owner.

Q. Did they do anything about fixing the hoist for you?

A. No, sir.

Q. During the time that you were in there, Mr. DeLonge, what lubricating oil products did you handle?

[fol. 2226] A. I handled Richfield lube, Richfield Penn and some Quaker State, some Pennzoil and some MacMillan Ring-Free.

Q. When was the first time that Richfield ever complained about your handling any of those brands that were not Richfield approved?

A. On Mr. Dinsmore's first trip to this station.

Q. Do you remember when that was?

A. No, sir, I can't say just exactly, but I would say offhand it was about the first part of November.

Q. All right. Will you tell us what happened?

A. Mr. Dinsmore came in and looked around the station, and told me everything looked very nice, but he said, "Bob, come here a minute. I want to talk to you in the office."

And I went in the office, and he looked down on my store-

room shelves, which are inside the display room, and apart from it, and said, "What's that stuff doing down there?"

And I said, "What stuff?"

He said, "That Quaker State, and Pennzoil, and MacMillan Ring-Free."

I said, "I sell it."

He said, "Who authorized you to sell that?"

And I told him that I didn't know that I had to have it endorsed to sell it, that certain customers specifically [fol. 2227] wanted that type and kind of oil, and that they were buying Richfield gasoline, but they wanted that oil in their cars and no other.

"Well," he said, "the next time I come through here, I would hate to have to make you lose this business just over a few cans of oil." He said, "It would be a good idea to get them out of here."

Q. What did you do with the oil?

A. I got it out.

Q. Did any other Richfield representative, Mr. Kaiser or anyone connected with Richfield, ever make any complaint any other time about the oil?

A. Yes, sir, Mr. Kaiser did.

Q. When was this?

A. That wasn't until after Mr. Dinsmore had come through.

Q. Could you place the date, as nearly as you can?

A. Yes, I would say it was about the middle of November.

Q. Will you tell us the conversation, and the incident relative to that?

A. Mr. Kaiser told me it had been reported to him that I was selling unauthorized brands of lubricating oil, and to save trouble for myself I should stop it immediately.

Q. And what did you tell him?

[fol. 2228] A. I told Mr. Kaiser that that was—the sale of that oil was necessary to my business progress, and that I felt that it was an imposition upon me to have to refrain from selling it.

Q. Was there anything further said at that time?

A. Yes. He said from now on I would sell Richfield products, and Richfield products only.

Q. Did you continue to carry those oils?

A. Yes, sir, I did.

Q. What did you do with them? Where did you——

A. I had to hide them on top of the office building and over the toilet.

Q. Now, will you tell us, did you have any difficulty relative to tires?

A. Yes, sir. Of course, in 1946 it was almost impossible to obtain tires of any kind, and the Richfield distributor was getting a few tires, but I wasn't getting any.

Q. How?

A. I was not getting any.

[fol. 2229] Q. I don't understand.

A. I say, the Richfield distributor, the local distributor was getting a few tires in his stock.

Q. Was that Mr. Kaiser?

A. That is right.

Q. Yes.

A. And I was not getting any.

Q. Had you made the request of him to get the tires?

A. Yes, sir, I did.

Q. And what was the conversation between you and Mr. Kaiser relative to those tires?

A. Mr. Kaiser told me that it was impossible to give me tires because I was such a large station that the business was almost a natural for me, but he had to distribute those tires in the outlying stations where a man didn't have much other incentive to draw business.

Q. Was there any further conversation at that time?

A. Yes, sir. I protested very seriously that I was the largest producer or the large salesman of gas and oil in that area, and I thought it was discrimination against me in him not to give me any tires.

Q. How did you know, Mr. DeLonge, that you were one of the largest salesmen in that area?

A. The Richfield Reporter, I believe the name of it—not "Richfield Reporter," but the Richfield Oil Corporation, [fol. 2230] every so often, published a little pamphlet and a statement in that as to the 10 highest sales outlets in the State of Washington.

Q. And where did you rate?

A. I ranked second.

Q. Let us go on with the conversation about the tires. Did he deliver you any tires?

A. Yes, sir, he did eventually. He delivered me five——

Q. Before we get to that delivery, did you get any other tires in the meantime?

A. No, sir.

Q. All right, go ahead.

A. Along in the early part of 1951—I can't give the exact date of that, either—the tank truck came in and dumped off five tires.

Q. The tank truck. Whose tank truck?

A. Mr. Kaiser's tank truck, the local distributor.

Q. And who was driving the truck?

A. Mr. Kaiser's son.

Q. What tires did he deliver?

A. He delivered five 650-15 tires.

Q. What did you tell him when he delivered those tires?

A. I told him that I absolutely couldn't use them, there was no outlet for them, no sale for them, and I could not afford to tie my money up into them and carry them in [fol. 2231] stock. Take them back to the distributor.

Q. Why were you not able to sell them?

A. Because those were the tires that were just coming out on the new cars that had just gone on the market, and there wasn't any sale for those tires then.

Q. Are most of the sales in a service station for replacement?

A. Yes, sir.

Q. What was the average size of tires you used for replacement sales?

A. It is 650-15, and better, or 16, I mean, or 600-16, either of those two sizes.

Q. What did he say when you told him that you could not sell them and he should take them back?

A. He said, "They have been consigned to you and they are here and you are going to keep them."

Q. Did you keep them?

Mr. Paradise: Who was this, please?

Mr. Hall: Kaiser's son, driving Kaiser's car.

A. Yes, sir, I kept them.

Q. Did you sell them?

A. No, sir.

Q. Now, did you ever have any difficulties relative to fan belts?

A. Yes, sir.

[fol. 2232] Q. Will you relate the circumstances on those?

A. I had a large board of fan belts on the wall and a man by the name of——

Q. Will you just explain to us briefly how a display of fan belts is accomplished?

A. Well, my fan belt board was about half as high as this wall from the panel up, and there were large hooks out from the wall every so often, and then they were marked for the sizes of the fan belts.

Q. About how many different sizes are there normally that you carry?

A. Approximately about 75 different sizes of belts.

Q. And about how many of each size does the average station like yours carry?

A. Well, in some sizes you only carry one of some sizes, but the popular sizes you would carry about two, maybe three, where you have a local distributor that you can get them from.

Q. You said you had this display. What kind of fan belts were they?

A. Well, I had some Gates fan belts up there and some other brands. I can't name them all right now.

Q. What was the Richfield recommended brand?

A. The Goodyear.

Q. And did you have any conversation with any Richfield [fol. 2233] representatives relative to those fan belts?

A. Yes, sir. Mr. Knudsen came through.

Q. Who was Mr. Knudsen?

A. Mr. Knudsen was a Richfield representative. However, I never could find out just what his capacity was. He seemed to work in all of them.

Q. Go ahead. What did he say?

A. Mr. Knudsen came around and he said, "Bob, you have got a beautiful looking station here. "But," he said, "that fan belt rack out there is going to have some attention. Come around here, I want to show you something."

And he singled out these Gates and these other fan belts that were there, and said, "Now, the Richfield Oil Corporation sells Goodyear fan belts and that is the only kind of a fan belt I want to see hanging on that rack the next time I come in here. Now," he said, "you have got an awfully nice start here and we are very happy with you, with the way you are operating the station." And he said, "Those fan belts will come off from there or somebody else will be running the station."

Q. Was anything further said?

A. Well, I said, "The people want them and this is a 24-hour station. We get people from all over the countryside and we have specific orders for those things." He said, "That doesn't enter into the question. Put Goodyear fan belts up there and that is the only kind."

[fol. 2234] Q. And did you put Goodyear fan belts up there?

A. I did.

Q. Did you ever have any trouble relative to battery cables?

A. Yes, sir, the same trouble relative to battery cables.

Q. Who made the complaint to you on that?

A. Mr. Kaiser did that.

Q. What battery cables were you handling?

A. Well, I can't just exactly say the name of them right now. I bought them from a distributor there in town. I bought those because I couldn't get them from the Richfield distributor at that time.

Q. Can you tell us this, Mr. DeLonge: Relative to these fan belts and battery cables were you able to purchase them at any better profit to yourself other than from Mr. Kaiser?

A. Yes.

Q. And was that one reason why you had purchased these?

A. That is one reason.

Q. Now, will you tell us relative to filters? Did you have any difficulties on filters?

A. Yes. I had some Fram filters in the stockroom and they were disapproved of by Mr. Kaiser.

Q. Were you able to purchase them any cheaper than you [fol. 2235] were the Richfield Purolator filters?

A. A cent or two, maybe, not very much.

Q. Why were you carrying Fram filters?

A. Because people would come in with a car with Fram units in them, and lots of people are as finicky about their cars as we are about our eating. They want a Fram filter in that unit and that is all they want.

Q. Was there any objection made to you by any Richfield representative?

A. Yes, sir.

Q. Who?

A. Mr. Kaiser.

Q. What did he say?

A. He said, "Purolator filters have replacement units for all Fram units, and you will sell the customer Purolator filters, not Fram filters, remember that."

Q. And did you continue thereafter, or did you purchase Purolator filters?

A. Yes, I did.

Q. Relative to spark plugs, what happened relative to spark plugs you were handling?

A. Well, I was given to thoroughly understand that I would have to sell Champion spark plugs and I would buy those spark plugs from Mr. Kaiser, the local distributor, only.

Q. Had you bought Champion spark plugs anywhere else? [fol. 2236] A. Yes.

Q. Where?

A. I had bought them from Olympia Auto Supply and Spoon's Auto Products.

Q. Why had you purchased those spark plugs other than from Mr. Kaiser?

A. Well, the reason was I could get them a little bit cheaper by buying them in lots.

Q. How often would these men come around to inspect your station while you were there?

A. Oh, there was somebody in there every month.

Q. You stated you were open 24 hours a day. Was that of your own volition?

A. No, sir.

Q. Because you wanted to?

A. No, sir.

Q. Who told you you had to stay open 24 hours a day?

A. Mr. Kaiser and Mr. Dinsmore.

Q. What did you tell them after you had been operating some time?

A. I told them that the night operation was awful costly to me. I was losing money on it.

Q. Did you make a check of your operation between midnight and 7:00 a. m.?

A. I did.

[fol. 2237] Q. What was the result of that check?

A. Well, the result of it was that I was not making enough money in that operation to pay the attendant and the lights and the water and other expenses that were incurred by that operation.

Q. Did you protest to Richfield?

A. Very vigorously.

Q. To whom?

A. Mr. Kaiser and Mr. Dinsmore.

Q. And what did they say?

A. Well, Mr. Kaiser was the first one I talked to. And he said, "This station has always been open 24 hours a day and you will keep it open 24 hours a day." I said, "Well, it is not profitable. I am losing money on that shift and I would like to close it from about 12:00 o'clock at night until about 6:30 in the morning." And he said, "Definitely no."

Q. Did you continue it then to keep it open?

A. Open.

Q. After you had been in the station, say, around six or eight months, will you tell us about what the average gallonage per month was that you were pumping?

A. Well, after I had been there about eight months I was taking about 25,000 gallons.

Q. Did that ever increase?

[fol. 2238] A. Yes, sir.

Q. What was your top figure, as nearly as you can recall?

A. Well, I can't give it exact, but I would say around 32,000.

Q. When did you leave that station?

A. On September the 29th. I think that is the exact date. I am not sure. 1947.

Q. Just to refresh your recollection, in approximately a year after you had been in it?

A. That is right.

Q. How did you happen to leave this station, Mr. DeLong?

A. Well, I was spending too many hours there. I was working too hard.

Q. Yes.

A. Help was almost impossible to get, that is, good, reliable help, and by not being able to close the station during that night period I was just getting worn out. Also, my rentals had been increased and it was impossible for me to carry on there, to the wefare of myself and my business.

Q. Did you make any attempts to sell this business to anyone?

A. Yes, sir.

Q. And did you obtain a purchaser who was satisfactory [fol. 2239] to you?

A. Yes, sir.

Q. And who was that purchaser?

A. A Mr. DeHoag and Mr. Baker. There were two of them.

Q. And did you put a price upon your business?

A. Yes, sir.

Q. And what was that price?

A. The exact——

Mr. Paradise: I submit, if the court please, that this is immaterial and is also hearsay insofar as this defendant is concerned.

Mr. Hall: It is preliminary as to what I am going to bring up as to Richfield's participation in this, your Honor.

The Court: All right.

A. I told him the price of the station would be just exactly the cost of the inventory.

By Mr. Hall:

Q. Was that agreeable to him?

A. That was agreeable.

Q. Then what did you tell him?

A. We took the inventory and——

Q. No, but I mean relative to Richfield. What did you tell either Mr. Baker or Mr. DeHoag?

A. I told them that they would have to see Mr. Kisor after the inventory was taken.

Q. Do you know what happened between Mr. Kisor and [fol. 2240] either Mr. Baker or Mr. DeHoag?

A. The first time Mr. DeHoag went down to see Mr. Kisor he couldn't see him.

Q. Were you present at any of the conversations between them?

A. No, sir.

Q. Did Mr. Kisor or any other Richfield representative ever speak to you about this proposed sale to Mr. DeHoag and Mr. Baker?

A. Yes, sir.

Q. And who was it?

A. That was Mr. Dinsmore and Mr. Knudsen.

Q. And about when?

A. That was the day that I was put out.

Q. What did they say?

A. Mr. DeHoag and Mr. Baker stood with their check made out for the full amount of the inventory and told Mr. Dinsmore that they were ready to purchase the property, and Mr. Dinsmore turned around and told them it was no use and they could get out.

Q. Do you remember what the amount of that check was?

A. It was $5,476, I think. I won't swear to that exact figure, but that was pretty close.

Q. And did Mr. Baker and Mr. DeHoag get out?

A. Well, they didn't immediately. They stood around [fol. 2241] Q. Was there any further conversation?

A. Yes, sir.

Q. What was it?

A. They said that it was an ideal station and I had a good business and that they would sure like to have it.

And they were saying this to Richfield representatives in general there. And Mr. Kisor informed Mr. DeHoag then that the prospective purchaser that they had had been promised my station eight months prior to that time, even before I thought anything of selling it.

Mr. Paradise: He told that to them in your presence?
The Witness: Yes, sir, he told them that in my presence.

By Mr. Hall:

Q. And then what followed?
A. Well, this Mr. Winters——
Q. Who is Mr. Winters?
A. Mr. Winters is the Richfield sales person.
Q. First, did you have any further conversation with either Kisor or Dinsmore relative to this man Winters?
A. Yes, sir.
Q. After you couldn't sell it to DeHoag and Baker?
A. Yes, sir. Mr. Kisor—well, I had better put it this way: One night about 9:00 o'clock a man came into the station and said, "I understand you want to sell this place." And I said, "Yes, I would like to sell it." And he looked around and he said, "You got a pretty nice place here." He [fol. 2242] said, "Mr. Kisor sent me down to buy it." And I said, "Well, that is all right if you have got the money. Your money is as good as anyone's."
Q. May I ask now, was this after the Baker and DeHoag deal had fallen through?
A. No, sir. This was before the Baker and DeHoag conversation. I said, "If you have the money, I guess your money is as good as anyone's." He said, "What do you want for it?" I said, "Well, I want just exactly the inventory price of it." "Ah," he said, "I won't have to pay that, I will tell you that." I had told him what the inventory price was at that time because I had taken the inventory. And then was the time he gave me the laugh and said he could buy it a lot cheaper than that. And I said, "Well, Mister, if you came here to insult me, get out on the street and stay out of here."
Q. He got out?
A. He got out, but, he said, "I will be back tomorrow morning about 8:00 o'clock."

Mr. Paradise: Can we have the time of this conversation, please?

The Witness: At 9:00 o'clock in the evening, sir.

Mr. Paradise: No. I mean the date.

Mr. Hall: About a week before. It was about the second or third week in October, he said.

[fol. 2243] The Witness: He was back at 8:00 o'clock in the morning, all right, but I had——

By Mr. Hall:

Q. Was he accompanied by anyone?

A. Yes, sir.

Q. Who?

A. He had Mr. Dinsmore and Mr. Knudsen with him.

Q. Will you tell us what happened then?

A. Mr. Winters walked on in the station and Mr. Dinsmore and Mr. Knudsen stopped on the edge of the premises and called me over. And they put their arm around my back and said, "Well, Bob, I guess you will be able to sell all right." And I said, "Well, it is all right with me if everything goes according to the way it should be." And they said, "Well, now, understand we are down here as representatives of the Richfield Oil Corporation and we are just here to facilitate this sale. We want to see that everybody is satisfied on both sides and we are here as much for your protection as we are for anyone else's." And I remarked then that there was no one ever took me into the station when I went there and paid $6,000 for it. Well, of course, those times were different then. Now, this is the way we are going to do it. Well, I said, "That is all right. Let's go if the man wants to buy it." So then we went on in the station.

Q. Then what followed?

A. Well, they immediately proceeded to go over my [fol. 2244] stock on the shelves and the man—and Mr. Winters and Mr. Dinsmore and Mr. Knudsen and myself and the bookkeeper were all in this, in this stockroom where the bookkeeper's desk was there, anyway, and Mr. Winters looked at some items there. Well, he said, "I will take those Purolators and I will take the spark plugs and I will take the headlight lenses, and I will take vari-

ous other items." And I said, "Wait a minute, here. What is going on now?" I said, "If you want this property, you will take it as is. Now, that is the only way I will sell it. I have got it for sale just that way." And Mr. Dinsmore turned around to me and said, "Now, look. This man doesn't have to buy a single thing in this place except what is Richfield approved." Well, I said,—I made a remark then that this was the United States, not Russia. I said, "I am going to call my lawyer." So I said, "Everything is going to stand still until my lawyer gets here."

[fol. 2245] Q. Now, was it at this time that they offered you a termination agreement for you to sign?

A. A few hours later.

Q. A few hours later?

A. Yes, sir.

Q. You called your lawyer then?

A. Yes, sir.

Q. Did he come down?

A. Yes, sir, he came down.

Q. Did you or did you not agree to sell this place to Winters?

A. No, sir, I never agreed to sell it to him.

Q. Did Richfield officials offer you a termination agreement to sign?

A. Yes, sir, they did.

Mr. Hall: Will you mark this for identification, please, Mr. Childress?

The Clerk: Government's Exhibit 20, marked for identification.

(The document referred to was marked Plaintiff's Exhibit 20, for identification.)

By Mr. Hall:

Q. I will hand you Government's Exhibit 20, and ask you if that is the termination agreement which they submitted to you and asked you to sign.

A. That is.

[fol. 2246] Mr. Hall: I will offer Government's Exhibit 20 in evidence.

Mr. Paradise: No objection.

Mr. Hall: Government's Exhibit 20 is offered in evidence, your Honor.

The Clerk: Is it admitted, your Honor?

The Court: It may be received.

The Clerk: Exhibit 20 in evidence.

(The document referred to, heretofore marked Plaintiff's Exhibit 20, for identification, was received in evidence.)

By Mr. Hall:

Q. Did you show this to your attorney?

A. Yes, sir, I did.

Q. What did he tell you?

A. He said, "I'll take care of that."

Mr. Paradise: I will object to that.

By Mr. Hall:

Q. Was this in the presence of Mr. Dinsmore and Mr. Kaiser?

A. Yes, sir.

Q. What did he tell you?

A. He said, "I'll take care of that," and he put it in his pocket.

Q. Was it upon his advice that you refused to sign it?

A. Yes, sir.

Q. Then what happened?

[fol. 2247] A. Mr. Dinsmore just laughed and said, "Well, we'll take care of it anyway." So Mr.—the lawyer, and Mr. Dinsmore, and Mr. Knudsen went into conference, which I didn't hear, they went off to one side, and went into conference.

Q. Then what was told to you about when you should get out of there by any Richfield representative? First, name the representative.

A. Mr. Dinsmore.

Q. And when was this?

A. About a half hour after this termination lease was offered.

Q. What did he say to you?

A. He said, "Be out of here by 8:00 o'clock in the morning, and take all that trash with you," indicating my stock.

Q. Was that stock the stock which they had refused to purchase?

A. That was.

Q. Was that stock that you used regularly in your business,——

A. Yes, sir.

Q. —and sold?

A. Yes, sir.

Q. Was there anything further said immediately at that [fol. 2248] time about your getting out?

A. Mr. Kaiser in my presence, that is, so I could hear it, told Mr. Dinsmore, "Let's get him out of here at midnight. Then the customers won't know we are kicking him out."

Q. Did you get out of the station?

A. I got out of the station at 8:00 o'clock in the morning. Mr. Winters refused to take the station over at midnight.

Q. And what happened with the stock that was in there?

A. We loaded it into boxes and put it on a truck, and I had to haul it home, have it hauled home.

Mr. Hall: Pardon me just a moment.

The Court: How did you finally adjust the inventory?

The Witness: Well, sir, I took the stuff home and put it in my garage, and tried to sell it back to my creditors for whatever I could get for it, to satisfy my creditors.

The Court: How about the portion you left in there?

The Witness: I didn't get paid for it for two months. The incoming man bought it, but I didn't get paid for two months.

The Court: What did it amount to?

The Witness: About $1300, sir. The total inventory was 5,000, sir.

[fol. 2249] Mr. Hall: I was going to ask that, your Honor. Thank you very much.

The Court: You had a hiatus there, so I brought it out. You created a vacuum. That is the expression they use now. You created a vacuum, and I walked into it.

Mr. Hall: Thank you very much. Your witness.

The Court: Except mine isn't so very ominous, I think.
Mr. Hall: I am very grateful, your Honor.

Cross-examination.

By Mr. Paradise:

Q. Mr. DeLonge, first, I would like to ask you about this matter of the rental increase that you mentioned. What was your rent at the time you first occupied the station, do you know?

A. Yes, sir, one cent a gallon for the first 20,000, and half a cent over 20,000. $200 flat and a gallonage rental.

Q. I am not sure that I heard you correctly. Would you speak a little louder, please?

A. $200 flat, and gallonage over rental.

Q. That was at the time you first went in?

A. Yes, sir.

Q. $200 flat, with a half cent over 20,000 gallons?

A. That's right, sir.

[fol. 2250] Q. I will show you this lease, Mr. DeLonge, and ask you if, by examining it, you will indicate whether that was not incorrect.

A. (Examining document) No, sir. That isn't the rental we paid. This calls for $100, and a half cent.

Q. Yes, sir.

A. And we paid $200 and a half cent rental, sir.

Q. Isn't it correct, Mr. DeLonge, that you paid $100 per month, which represents one cent per gallon on the first 10,000 gallons, that you paid no rent whatsoever on the next 10,000 gallons, and you paid a half a cent a gallon in excess of 20,000 gallons?

A. Not to my recollection, sir. Of course, the bookkeeper took care of most of that part, but it was my recollection it was two cents a gallon up to 20,000 gallons. Wait a minute. You are right. I am very sorry. I was mixed up there.

The Court: Well, you paid whatever that worked out, in figures?

The Witness: Yes, sir, plus an extra $100 a month, sir.

By Mr. Paradise:

Q. Plus an extra $100 a month?

A. Yes, sir, to the local distributor.

Q. You paid him directly?

A. Yes, sir.

[fol. 2251] Q. Under an arrangement you made with Richfield?

A. No, sir, under an arrangement I had to make with him.

Q. That is nothing Richfield ever heard about, is it?

A. I don't know whether they heard about it, but I know he was a Richfield representative.

Q. Well, you made this payment to him personally?

A. Yes, sir.

Q. For his own account?

A. Yes, sir.

The Court: What was that for?

The Witness: This was for basic rental, sir. I will take that back. That was an additional $100 I had to pay him for the privilege of renting it.

The Court: It was a little overriding royalty?

The Witness: That's right.

The Court: You would call that graft, if he was in public office, unless you got something for it.

By Mr. Paradise:

Q. What was this man's name?

A. Mr. Orville Kaiser.

The Court: How did you pay it,—by check?

The Witness: Yes, sir.

By Mr. Paradise:

Q. How did this come about?

A. The second month I was in there, Mr. Kaiser came [fol. 2252] down and said, "Now, it has been customary for the occupants of this station to pay the local distributor $100 a month rent."

And I said, "My lease doesn't say anything about it."

He said, "Now, Bob, you've got the place," and by that time I had it going nicely,—"you've got this place, and

you make it. It is all right, and if you want to stay here, of course, that is the way it works."

And that's the way it had to work.

Q. You understood that Mr. Kaiser was a distributor?

A. Yes, sir.

Q. A commission agent?

A. Well, sir, I don't know what his arrangement was with Richfield.

Q. You knew he was not a salaried employee of Richfield?

A. I didn't know that, no, sir. I didn't know what his arrangement was.

The Court: But you got your supplies from him, the TBA?

The Witness: The TBA, yes, sir.

By Mr. Paradise:

Q. Now, there were other Richfield people whom you mentioned, Mr. Knudsen, and Mr. Dinsmore——

A. And Mr. Buck.

Q. Did you ever talk to any other Richfield people besides [fol. 2253] those three?

A. No, sir, I never did.

Q. Did you ever mention to Mr. Knudsen, or Mr. Buck, or Mr. Dinsmore, that you were required by Mr. Kaiser to pay to Mr. Kaiser an additional $100 a month?

A. Not to my knowledge, sir.

Q. Why didn't you?

A. Because I—as soon as I mentioned to Mr. Dinsmore, I would be out of business.

Q. Now, you mentioned that your rental was increased during the term of your lease.

A. It was, yes, sir.

Q. This rental amendment dated July 29, 1947, changes the rental from $100 a month with one-half cent over 20,000 gallons, to $50 a month with an additional rental of one cent for each gallon over 5,000 gallons; is that correct?

A. That's correct.

Q. During this time you occupied this station, even after this rental amendment was signed, did you ever pay more than one cent per gallon per month to Richfield?

A. No, sir.

Q. Now, as I understood it, your first discussion of going into this station was with this same Mr. Kisor?

A. That's right, sir.

Q. To whom you subsequently paid the $100 a month?

[fol. 2254] A. That's right.

Q. And you told him that you wanted a station?

A. That's right, sir.

Q. And he told you that this particular station is going to be available?

A. That's right, sir.

Q. And you went out, and it was at his suggestion that you went to see, I think you mentioned, the boys that operated it?

A. Yes, sir.

Q. Were those the Million Brothers?

A. No, sir; that was one Million brother, and Mr. Larson.

Q. I see. It was at that time that they wanted to make a sales price of $6,000; is that right?

A. That's right.

Q. What did that 6,000 represent?

A. Very little, sir. There was hardly anything in the place. The equipment, the old hoist was broken down, and there were two Walker floor jack hoists, and one of them was broken and discarded. And there was very little stock on the shelves; just what they would have for day-to-day business.

Q. This broken hoist you are talking about, is that the same hoist you mentioned before?

[fol. 2255] A. No, sir. I am talking about a floor jack hoist.

Q. You are not talking now about the hoist you were discussing with Mr. Hall during his examination?

A. No, sir. It was a floor jack.

Q. Just a jack?

A. Yes, sir.

Q. A movable item?

A. That's right.

Q. Did the $6,000 cover any accessories?

A. No, sir, there were very few accessories there. All

together, sir, if I might say so, there was about $200 worth of stock in accessories, sir.

Q. Then is it your understanding that the $6,000 represented some intangible value, in the nature of good will?

A. That's right, sir.

Q. Now, what was the other man's name? Mr. Million and——

A. And Mr. Larson.

Q. Mr. Million and Mr. Larson?

A. Yes, sir.

Q. After Mr. Million and Mr. Larson talked to you, you had another conversation with Mr. Kisor?

A. Yes, sir.

Q. And what did Mr. Kisor tell you?

[fol. 2256] A. Well, he said, "That's an awful price, but," he said, "if you want to wait a week I will let you in there, and it won't cost you anything."

And I said, "What do you mean by that?"

"Well," he said, "I have ways and means of taking care of those guys down there. I'm gettting tired of them anyway, and"—do you want me to finish?

The Court: Go ahead.

By Mr. Paradise:

Q. Give me the full conversation.

A. I said, "I don't want that kind of business. I don't want to be a part of that kind of business. I want to go in that station with the good will of the men that went out of it and the good will of the customers that come in, and if I go in there, I'll pay their price and make my own business."

Q. Didn't Mr. Kisor tell you at the same time and on this same occasion that the Richfield Oid Corporation does not permit any good will value on the transfer of a station?

A. No, sir.

Q. And that the operator is only in there on a 24-hour basis to run the station for Richfield?

A. No, sir.

Q. Didn't he tell you that?

A. No.

Q. Didn't he tell you that Richfield did not permit an

[fol. 2257] operator, when he is leaving the station, to charge any item for so-called "Blue Sky," which is the trade expression used for that?

A. No, sir, he didn't tell me that.

Q. And didn't he tell you an incoming operator is not permitted to have any "Blue Sky"?

A. No, sir, he didn't tell me that.

Q. But, at any rate, he told you not to pay these people $6,000, and that if you would wait a week, you could have it for nothing?

A. That's right.

Q. Now, then, you bought a partnership interest with Mr. Million?

A. That's right.

Q. Notwithstanding that Mr. Kisor told you not to pay anything for it?

A. That's right.

Q. And then you operated the station in partnership with Mr. Million for a month and a half before Mr. Million departed?

A. That's right.

Q. Did you buy Mr. Million out?

A. Yes, sir.

Q. That was a dissolution of your partnership?

A. Yes, sir.

[fol. 2258] Q. It was at that time that this 542 form sublease was entered into with you personally?

A. About that time, sir. May I make a statement there, that I asked Mr. Kisor for a copy of that lease,——

Q. Yes.

A. —and he told me that there was not one available. I didn't have any opportunity to see the lease before I went into the place, or to read a copy of it.

Q. No copy has ever been delivered to you?

A. No. A copy of the lease with me, but I wanted to see what the lease looked like before I went in, neither Mr. Kisor nor Mr. Million would show me the copy of the lease that they had.

Q. What date did you go into this station?

A. On September 10, 1946.

Q. You didn't see this lease before you moved in?

A. No, I didn't, sir.

Q. How much did you pay Mr. Larson for his partnership interest, when you bought in with Mr. Million?

A. $3,000 cash.

Q. Did you make any investigation of the assets of that partnership?

A. I made an investigation of the—of his actual investment, not the assets. The assets were visible right there.

[fol. 2259] Q. You saw what the assets were?

A. Yes, sir.

Q. Now, at the time you spent this money and bought into this partnership, did you ask either Mr. Million or Mr. Larson the terms of their lease with the Richfield Oil Corporation?

A. Yes, sir, I did.

Q. Did you see that lease?

A. No, sir, I didn't.

Q. Did you ask for it?

A. Yes, sir, several times.

Q. Why didn't they show it to you?

A. They said they didn't have one.

Q. They didn't have one to show you?

A. But they were lying. I found that out later.

Q. They did have one?

A. Yes, sir. Then I asked Mr. Kisor for a copy of the lease, and he said he didn't have one.

Q. Do you now know that this form of lease, and when I say "this form," I mean the fact that this lease contains a provision that either you or Richfield Oil Corporation could terminate it on 24 hours' notice, that that same clause was also contained in the lease between Richfield and Mr. Million and Mr. Larson?

A. I understand that now.

[fol. 2260] Q. Yes. Now, at the time you moved into the station, as I understand it, Mr. Kisor told you that you could operate this station—you could remain in the station so long as you operated it for the benefit of Richfield?

A. That's correct.

Q. Is that correct?

A. That is correct.

Q. Was there any enlargement on that?

A. Well, Mr. Buck and Mr. Knudsen, or, Mr. Dinsmore, both enlarged upon it to the extent that they wanted me to take over another station, in addition to this one, up on——

Q. I am talking about the manner of operation, Mr. DeLonge.

A. I didn't quite get your question.

Q. That it be operated for the benefit of Richfield?

A. I must have—well, the best way I can say is that all Richfield representatives, every time they came in, were so complimentary about this operation, that that's all I ever heard from them.

Q. Did any of these Richfield representatives tell you that your purchase of Richfield non-approved accessories was not to the benefit of Richfield?

A. I don't quite get the way you put that question, sir.

Q. Well, put it this way——

[fol. 2261] The Court: In telling you not to buy, did they tell you why,—why they didn't want you to buy them?

The Witness: They told me Richfield controlled or had plenty of this stuff to sell, and I am to buy it from Richfield,—Richfield alone. That was told to me.

Mr. Hall: Your Honor please, may I ask that the date of this conversation be set by counsel?

The Court: Well, there were several conversations about it?

The Witness: Yes.

Mr. Hall: I assumed it was after he got into the station.

The Witness: It was, sir. It was about two months after I got into the station.

By Mr. Paradise:

Q. But you understood at the time, before you went in, in your conversation with Mr. Kisor that your tenure in that station was subject to your operation of the thing for Richfield's benefit?

A. That's right, sir.

Q. Were you told to wear a uniform?

A. Yes, sir.

Q. Did you wear them?

A. We certainly did.

Q. The merchandiser,—by the way, Mr. Knudsen and Mr. Dinsmore were both merchandisers, were they not?

[fol. 2262] A. Yes, sir.

Q. They came around at least once a month to your station to examine it?

A. About that.

Q. And they brought to you a form called "Survey of Service Station Operation," did they not?

A. No, sir, I never saw one.

The Court: How long did you stay all together?

The Witness: Almost a year, sir, to the day; a few days over.

The Court: Can you produce those checks if a question should arise as to whether you paid those $100 amounts to Mr.——

The Witness: Kisor?

The Court: —to Mr. Kisor? Can you produce those checks?

The Witness: I think I can, sir. I think they are all saved. I don't want to make an actual statement.

The Court: No. I just wanted to ask that, so that if he is a witness and denies it and it is necessary to have a check,—a check tells a story.

The Witness: I think I have them, sir.

The Court: It is interesting to know what was being done in this particular case.

Mr. Paradise: I might say it is also exceedingly inter-

[fol. 2263] esting to the defendant.

The Court: That demonstrates what I have said many times, that these businessmen will brag about business ethics, but if any man in public office were to do any of these things, he would be in jail, and what they consider as honest rent would be considered graft in the case of a man in public office. And yet I suppose a businessman like that will get up in these Rotary Club meetings and make speeches about a man who is in public office. Not that that is new. It is exactly in the pattern which is developed many a time in court cases. But it is interesting to see what these men do. A man gets him into a station, with which he has

nothing to do, and then he gets a rent graft on the side of $100 a month for allowing him to stay there.

The Witness: May I state there is almost a verification of that fact in Mr. Hill's brief, a wire-recorded message by my lawyer of a telephone conversation that Mr. Kisor had with me, beseeching me to keep my personal business with him between ourselves.

The Court: That is all right. W don't need to use that. I just wanted to know if that was there in case he should be a witness later on. Go ahead.

By Mr. Paradise:

Q. Did Mr. Knudsen——

The Court: Of course, Richfield does not have to call him. [fol. 2264] Mr. Paradise: I might mention to the court that this witness has testified that Richfield had nothing to do with this matter of $100.

The Witness: No, nothing whatever, I don't think.

The Court: I am not holding you responsible.

The Witness: Mr. Kisor is not with them.

The Court: I am not holding you responsible for what he does, but it helps create, to use a common expression, a picture of some of these details. That is all. Besides that I may say I am not interested in the ethics with which any of your men ran the business. You see, I am not sitting in judgment on that. I am interested in only one thing, and that is whether there is a violation here of the anti-trust law. As to other matters, they are beyond my control. I am not a keeper of the conscience of the various distributors or merchandisers that this or any other company might have in its employ. I have worries enough without having to worry about that.

Mr. Paradise: And, your Honor, the Richfield management will be very interested as to the $100 that the witness paid to Mr. Kisor, and we also want to say that Mr. Kisor is not now an employee of the Richfield Oil Corporation.

The Court: All right.

By Mr. Paradise:

Q. Mr. DeLonge, I will show you Defendant's Exhibit C,——

[fol. 2265] The Court: I will make a statement off the record.

(Statement off the record.)

The Court: This is a friendly law suit, gentlemen, and I like occasionally to get away from it and make some general observations on the state of the country.

[fol. 2266] By Mr. Paradise:

Q. Mr. DeLonge, I have forgotten now whether I have asked you whether you have seen this form.

A. No, you haven't yet. I haven't seen it. Oh, you had asked me if I had seen one. No, sir, I have never seen one.

Q. You have not seen one?

A. No, sir.

Q. Thank you. On how many occasions, Mr. DeLonge, did these merchandisers, Mr. Dinsmore or Mr. Knudsen or the TBA distributor—Mr. Kisor was both TBA distributor and sales commission agent, wasn't he?

A. Yes, that is right.

Q. On how many occasions did Mr. Dinsmore or Mr. Knudsen or Mr. Kisor complain to you about your handling non-authorized TBA?

A. Well, the total number probably would be about six or seven times.

Q. And did those occasions continue throughout this period of years that you were in the station?

A. Yes, sir, every time they found anything that didn't——

Q. How soon was the first one after you moved in?

A. The first?

Q. The first, yes.

[fol. 2267] A. The second month.

Q. The second month?

A. Yes.

Q. And did you ever handle non-Richfield lubricating oils or greases in the station?

A. A little Quaker State and Pennzoil and MacMillan Ring-Free is all, just maybe about four cans at a time of each.

Q. On how many occasions did either of these three gentlemen, Mr. Dinsmore or Mr. Knudsen or Mr. Kisor, complain about that?

A. Mr. Dinsmore once and Mr. Kisor, not long after, about the same incident.

Q. There were only two complaints about that?

A. That is right.

Q. How soon did those occur after you commenced operating this station?

A. Well, almost immediately after Mr. Dinsmore began to work for the company, or at least that I knew he was, and I can't say. I would say it was about the third month after I was in the station. That was the first time I ever saw Mr. Dinsmore.

Q. Notwithstanding these complaints, you continued to buy this stuff and to handle it, is that correct?

A. Yes, sir, I did.

[fol. 2268] Q. You continued to buy Quaker State and Pennzoil products?

A. Yes, sir.

Q. And MacMillan oil?

A. Yes, sir.

Q. You continued to purchase non-approved Richfield TBA? I mean TBA not approved by Richfield for credit card purposes?

A. That is right, sir.

Q. You continued to buy fan belts that were not Goodyear fan belts?

A. No, sir.

Q. What were the non-approved items that you continued to purchase after they complained about it?

A. Just oil.

Q. What?

A. Just a little bit of oil.

Q. Didn't you continue handling non-approved batteries?

A. Non-approved batteries?

Q. Yes.

A. No, sir, not after I could buy Richfield batteries from Mr. Kisor.

Q. Well, I thought in response to Mr. Hall's questions you testified that after Mr. Kisor or Mr. Dinsmore or Mr. Knudsen complained about this unauthorized TBA that you [fol. 2269] still continued to purchase it.

A. I think you will find that that just relates to oil.

Q. Just to oil?

A. Yes, sir.

Q. You completely discontinued buying unapproved merchandise?

A. That is right, sir. And batteries, sir, if I might observe, it was impossible to supply me with batteries and I was given authorization by Mr. Kisor to go out and buy batteries wherever I could buy them.

Q. This incident about the hoist that broke, when did that break, how soon after you moved into the station?

A. Right after the first of the year, sir.

Q. When did you move in?

A. I moved in in September of 1947—in 1946, rather, and my recollection is it was right after the first of the year that it broke down.

Q. And, as I understood your statement, you complained about this to Mr. Kisor?

A. Yes, sir.

Q. And what was his statement to you?

A. He said that he would go down and see it.

Q. And he did come down and see it?

A. About five hours, six hours later, yes, sir.

Q. Will you describe what this hoist was?

[fol. 2270] A. Yes, sir.

Q. What it consists of, describe it simply.

A. It consists of two long runways that are slightly raised from the ground, and there is an electric motor with a framework over it, and there is an electric motor on the top that winds up cables on a shaft on each one that when the electric motor is turned on, the car is being lifted into the air on these two flat runways, solely on the strength of these cables and various gears that run shafts to pull the cables. And these were worn so badly that they were slipping. You put a car on and start to raise it up and

the gears would slip like that, and the car would jerk. And I had complained about the condition of it before it broke.

Q. Complained to whom?

A. Mr. Kisor.

Q. What did he tell you at that time?

A. Oh, he said, "They have always used it that way," he said, "and there is nothing ever happened to it yet," which I found out wasn't the truth.

Q. After the mechanism broke and you called Mr. Kisor and he came down to examine it what did he tell you? What was your conversation with him?

A. Well, he said, "It looks pretty bad, doesn't it, Bob?" And I said, "It sure does." All these ropes, shafts and everything were just bent double like that, and even the [fol. 2271] floor, the runways on the floor in falling had struck the floor so hard, with the car on them, that it had buckled them and bent them. The castings were all broken. The motor housing was broken. The thing was just a total wreck. Both of the front-end cables were broken. Well, he said, "It looks pretty bad." He said, "I will get a man to come down here and give us a bid on fixing it up."

The Court: Had it just given out, worn out?

The Witness: Yes, sir. It had been there over 14 years, sir. It had lived its natural life.

The Court: You push a button and it moves up itself?

The Witness: Yes.

The Court: They thought evidently it would last forever.

The Witness: Yes, sir.

By Mr. Paradise:

Q. Did Mr. Kisor indicate to you if he thought it could be repaired?

A. Yes, he did.

Q. What did you tell him?

A. I told him that it couldn't be repaired and used with safety, and that I would not trust a man under it or somebody else's car on it.

Q. Did Mr. Kisor tell you anything about Richfield's obligation with respect to the repair of that?

A. Yes, sir.

Q. What was his statement in that regard?

[fol. 2272] A. He said that he would have to talk with the Richfield representative, district representative about Richfield doing anything about it. He didn't know whether Richfield would do anything about it or not.

The Court: Didn't you say something on direct examination that somebody told you it was not their obligation but it was the owner's?

The Witness: Yes, sir.

The Court: Who told you that?

The Witness: The Richfield representative.

The Court: Oh, after?

The Witness: Yes, sir. I was just coming to that.

The Court: You are coming to that?

The Witness: Yes, sir.

The Court: I knew you had told us something about it. I was wondering if this was a conversation you had already told us about. All right.

By Mr. Paradise:

Q. Isn't it true, Mr. DeLonge, that you would not permit Mr. Kisor to come in and attempt to repair this hoist?

A. No, it is not true that I wouldn't permit him to come in and attempt to repair it. It is true that I would not use it after it was repaired the way they wanted to do it.

Q. It is not true that you told him that you would not permit it to be repaired?

[fol. 2273] A. No, sir, it is not true.

Q. What did you tell him?

A. I told him that I would not use that hoist. I said, "Don't repair that hoist for my use in business because I won't trust a man under it nor a car on it. It is worn out." But I never stopped him from repairing it.

The Court: Well, what was your idea? You did not think that it was safe?

The Witness: No, sir, it was not safe, your Honor. It was not only worn out in the parts that had broken, it was worn out over itself entirely.

The Court: Did they ultimately replace it?

The Witness: No, they did not.

The Court: Supposing they replaced with new parts as they were in the condition in which they were in the beginning, would you have used it?

The Witness: The thing was like a one-horse shay, your Honor. It had fallen all apart at one time.

The Court: Did you ever get under that to a car to do the greasing yourself?

The Witness: I had been, yes, sir, like this, way off to one side like I was getting close to a bee's nest or something like that.

The Court: All right.

By Mr. Paradise:

[fol. 2274] Q. So you installed another hoist there yourself?

A. That is right, I did, sir.

Q. What happened to that hoist at the time you moved out?

A. It is still there, sir.

Q. Did you sell it?

A. No, sir.

Q. Did you get paid nothing for it?

A. No, sir.

Q. Did you ask them to pay for it?

A. Yes, sir.

Q. What happened?

A. Well, they said, in the true course of events, due to the fact that I had only about half paid for the hoist myself—I was buying it on the installment plan and I had it about half paid for—they, and I am talking about Richfield representative, Mr. Dinsmore, now, kept stalling me, saying there would be some adjustment of it if Winters purchased that property.

Q. In what?

A. In the purchase of the property.

Q. You mean you are talking about your inventory of accessories?

A. Yes, sir.

Q. Or of the gasoline?

[fol. 2275] A. That it would be included in that.

Q. Yes.

A. But it never was.

The Court: Finally, what happened when you got through?

The Witness: I was forced into bankruptcy, sir, and as far as I know I am still charged with the hoist.

The Court: They paid the claim?

The Witness: No, sir, they never paid the claim.

The Court: Did they pay the balance that was due?

The Witness: I asked the man that sold it to me just two days before I left home, if that hoist was still charged to me, if it had ever been paid for, and he said it was not.

The Court: All right. Well, you see, you tried to be fair and it didn't work in that particular case.

The Witness: That is right, sir. I did.

The Court: I hope you do not become cynical.

The Witness: It is not going to do that.

The Court: You just got a bad deal, because you thought you were buying goodwill on a proposition where there was nothing to sell?

The Witness: I built a lot of goodwill, sir. I had a lot of friends there. I lived there for 25 years.

The Court: You did not capitalize it when you left.

The Witness: No, sir. I didn't get anything.

The Court: You should have taken a station across the [fol. 2276] way there like some of the other boys did.

The Witness: There was one open at that time and I had an opportunnity to, sir, but I was too sick that I was afraid I might runto into another Richfield.

The Court: All right.

By Mr. Paradise:

Q. When did you decide, Mr. DeLonge, to leave this station?

A. Well, I decided to leave—decided to leave the day Mr. Dinsmore said, "Get out of here by 8:00 o'clock in the morning."

Q. Let me see. You moved in on September 1st, 1946?

A. That is right.

Q. And when did you move out?

A. September 29th or 22nd. Either the 22nd or 29th, I won't say exact.

Q. September 22nd or 29th of 1947?

A. Approximately.

Q. You had no idea of moving before that time?

A. Well, I had an idea of moving, yes, but I hadn't decided on it.

Q. That is what I asked you before.

A. I had had an idea of moving probably about two months before that.

The Court: But you thought you could dispose of it advantageously?

[fol. 2277] The Witness: That is correct, sir.

The Court: And had a deal pending.

The Witness: That is right, sir.

By Mr. Paradise:

Q. Then you did decide some time before Mr. Dinsmore told you to move out?

A. Yes, that I would like to.

Q. How many months before did you first discuss with any Richfield representative the fact that you wanted to get out?

A. Not until the last month that I was there.

Q. Is it true, Mr. DeLonge, that in a period of something over two months before you moved out you told Mr. Knudsen that you wanted to sell your inventory of equipment, your inventory on your gasoline to somebody, and asked if he would assist you in finding someone who would buy it?

A. That is not the exact way of it, no.

Q. Will you tell me what the exact way was?

A. Mr. Knudsen wanted to know—we were talking, and I said, "well, if I could find a good buyer for this, I would sell it. It is getting too much for me." And he said, "Well——"

Q. Said what?

A. "It is getting too much for me." And he said, "Well, maybe I can find a buyer for you." And I said, "Well, if you find one that has got the money, that is fine and [fol. 2278] dandy."

Q. Didn't you ask him to help you?

A. No, sir, I didn't ask him to help me.

Q. Then you went out and tried to find someone, is that correct?

A. No, sir, I didn't go out and try to find someone. These people came in the station.

Q. Tell me about this Mr. Baker and Mr. DeHoag. You sought them out?

A. I did not seek them out. They sought me.

Q. They sought you out?

A. Yes, sir.

Q. They came to you?

A. Yes, sir.

Q. When did they come to you?

A. They came to me approximately—oh, maybe three weeks before I left the station, possibly a little bit before that.

Q. And these are the people who offered to pay you $5,476, I think you said?

A. That is right.

Q. For your inventory of gasoline, oil, and tires, batteries and accessories?

A. That is right, sir.

Q. Did that amount also include the amount that you had paid for the hoist?

[fol. 2279] A. No, sir, it did not.

Q. You did not ask them to pay for the hoist?

A. I didn't ask them to pay, because I figured that was my own obligation and I would pay for that out of the purchase price.

Q. But they were going to get the hoist, anyway, or you were going to take that hoist with you?

A. No, sir. It was in there solidly. They got the hoist.

Q. But you were not going to charge them for the hoist?

A. I figured that was part of the business.

Q. You were going to give them the hoist?

A. That is right.

Q. Did you tell Mr. Knudsen about this?

A. Oh——

The Court: Just a minute.

The Witness: I made a misstatement there and I want to

correct it. I am not here to lie. That hoist was included in the inventory as it was made up, the cost of that hoist was included in the inventory. In other words, I was not making them a present of the hoist, naturally. It was included in the inventory.

By Mr. Paradise:

Q. The inventory to whom?

A. The inventory to Mr. DeHoag, that was included.

The Court: How much did you pay for it?

The Witness: $395 installed, sir, and I had figured that [fol. 2280] I had used the hoist up approximately $100, and I think that that is what the inventory appraised it at.

The Court: So you included that?

The Witness: That is right.

By Mr. Paradise:

Q. Did you tell Mr. Knudsen about your prospective arrangement with Mr. Baker and Mr. DeHoag?

A. No, sir.

Q. You did not?

A. No, sir, not until the day they came in there.

Q. Well, I don't care when you told them.

A. Oh.

Q. What day was that when you did tell them?

A. The day that I was evicted.

Q. Prior to the day you were evicted did you tell Mr. Dinsmore about this prospective deal with Mr. Baker and DeHoag?

A. I am sure I did not. Mr. DeHoag did.

Q. How do you know that?

A. Because Mr. DeHoag came in and worked for me for two weeks prior to the purchase of the property and he was—that is, his contemplated purchase of the property. He wanted to find out just what the business was like.

Q. I see. Did Mr. DeHoag tell you to whom at Richfield he had talked?

A. No, sir, he did not.

[fol. 2281] Q. He just said he had talked to Richfield about the fact that he wanted to buy from you, is that correct?

A. That is correct, sir.

Q. Did you tell it to—I have forgotten whether I asked you about Mr. Dinsmore or whether it was Mr. Kisor. I want to find out if you told to either Mr. Kisor, Mr. Dinsmore or Mr. Knudsen, before the time of your eviction, of this prospective deal with Mr. Baker and Mr. DeHoag?

A. Yes, sir. I told Mr. Kisor.

Q. Mr. Kisor?

A. That is correct.

Q. How long ahead of this eviction did you tell Mr. Kisor?

A. Probably about a month.

Q. About a week?

A. About a month.

Q. What did you tell him?

A. I told him that I would like to sell the property to these two boys. They had given fine references. Now, I am telling you what I told him.

Q. Yes.

A. One of them had been working for me and he was certainly an excellent man. I would like to be able to sell my property to them, my equity in that business.

Q. And when you say "your property" you are referring to your merchandise?

[fol. 2282] A. That is right.

Q. Your gasoline, oil, tires, batteries and accessories, is that correct?

A. And that only, and that only.

Q. Pardon me?

A. And that only.

Q. Yes. Is it not a fact, Mr. DeLonge, at sometime prior to your eviction Mr. Knudsen told you that you could sell whatever you wanted to to Mr. Baker and Mr. DeHoag but that Richfield would not lease this property to Mr. Baker and Mr. DeHoag because those men had stated that they wanted to use that property as an automotive radiator shop?

A. No, sir, that was never told to me.

Q. That was not told to you?

A. No, sir, that was never told to me.

Q. And you are positive of that?

A. That is right. And that has been brought up. That is not the first time that question has been put to me.

Q. That was not told to you either on the day of the eviction nor at any prior time by Mr. Knudsen?

A. The Richfield Oil Corporation through its representatives never gave me a reason for refusing to sell that property to those men.

Q. You would say it is not true, then, that Mr. Knudsen told you that Richfield refused to lease this property to [fol. 2283] you, but that you had a perfect right to sell to Mr. Baker and Mr. DeHoag whatever you wanted to out of your inventory of gasoline and lubricating oils and accessories?

A. That statement——

Mr. Hall: If your Honor please, I submit that has already been answered.

The Court: It has already been answered. He has answered it once. I will sustain the objection. It is a summarization of the talk that I criticized Mr. Greer for last week.

Mr. Paradise: Forgive me, your Honor.

Q. Mr. Winters was the man who was the successor operator?

A. That is right, sir.

Q. And he purchased from you a part of your inventory?

A. That is right.

Q. He purchased from you all of your gasoline, did he not?

A. That is right.

Q. He purchased from you all of your Richfield lubricating oils and greases, did he not?

A. That is right.

Q. He purchased from you some of your tires, batteries and accessories?

A. That is right.

[fol. 2284] Q. Tires, batteries and accessories which he did not purchase from you were non-approved Richfield tires, batteries and accessories?

A. That is right.

Q. They were tires, batteries and accessories which you

had purchased in violation of the instructions given you by Mr. Kisor, Mr. Dinsmore and Mr. Knudsen?

A. That is right.

The Court: What made the great disparity between $5,400 and $1,300?

The Witness: The stock I had to take home and put in my garage, sir.

The Court: Incidentally, in that $5,400 inventory you did not put anything down for goodwill, did you?

The Witness: No, sir. I was not selling that at all.

The Court: And the prices at which you listed them were the wholesale prices to you?

The Witness: That is correct.

The Court: You were not making a profit on the inventory at all?

The Witness: That is correct.

The Court: How did you put in the hoist, for what it cost you?

The Witness: For what it cost me and what the labor cost me.

[fol. 2285] The Court: You must have carried, then, a tremendous lot of non-approved stock?

The Witness: I had a repair business, an automotive repair business in the place there.

The Court: Well, you must have had, because ordinarily there would not be such a great disparity between the approved and non-approved things. Evidently you were using mostly non-approved things in the repair shop.

The Witness: Richfield does not sell those things, and anything they don't sell is non-approved.

The Court: I see. All right.

By Mr. Paradise:

Q. You stated that Mr. Dinsmore had stated in the presence of you and Mr. Winters that Mr. Winters does not have to buy any of your stock of unapproved merchandise?

A. That is right, sir.

Q. Is that correct?

A. That is correct.

Q. Had any Richfield employee ever told you that it was going to assist you in the sale of unapproved merchandise?

A. No, sir, not prior to that moment.

Q. Pardon me?

A. Not prior to that moment.

Q. Or at that moment?

A. I say, not prior to that moment. They told me right then.

[fol. 2286] Q. Right then they told you that they would not?

A. Yes, sir.

Q. Nor prior to that moment had they ever told you that, had they?

A. They told me right at that moment that they were going to assist me in the sale of that property.

Q. I am afraid I do not understand your answer.

The Court: You called that "helping you"?

The Witness: Yes, sir.

The Court: After they turned you down and forbid you to take the check for $5,400 they were helping you out in a deal where you got $1,300, and you were told to take your junk out. That was their idea of helping you?

The Witness: That is correct.

The Court: They were good Boy Scouts.

The Witness: Like putting a man in a puddle of water and pushing him down in and then pulling him out.

The Court: All right.

By Mr. Paradise:

Q. Mr. DeLonge, sometime after you left this property you filed a lawsuit, did you not, against the Richfield Oil Corporation?

A. That is right.

Q. And you joined in that lawsuit as defendants Mr. Orville Kisor and the Ordel Oil Company and Mr. Knudsen and Mr. Dinsmore, all as defendants?

[fol. 2287] A. That is correct.

Q. And you sued for a recovery of the amount you thought you had lost by this sale between what you sold to Mr.

Winters and what you said you could have gotten from Mr.——

A. DeHoag.

Q. DeHoag. And is it not true that that action was tried before a jury in Olympia, Washington, and that the jury found that you were not entitled to anything?

A. No, sir, that is not a fact.

Mr. Hall: If your Honor please, I think inquiry into these matters that are strictly legal——

The Court: No, no. That goes to motive and bias. The pendency of litigation concerning a matter is always permissible.

Mr. Hall: I was just wondering about the files, that he should have the legal files and the court papers here.

The Court: No, I do not think so. The pendency of a lawsuit may go to bias and interest, etc. I think this witness feels he got a raw deal.

Mr. Paradise: I have no doubt of that, your Honor.

The Court: And I think he did get a raw deal. Whether he blamed the right persons or not I do not know, but it does not make any difference. I think on the whole deal he got a raw deal.

[fol. 2288] Mr. Paradise: If I may interject a comment at this time?

The Court: Yes.

Mr. Paradise: I think the incidents that we have been trying two weeks have been peculiarly isolated instances of raw deals, and that we are not trying an antitrust case.

The Court: Well, all right. As I say, we are not trying the ethics of the Richfield Oil Corporation or the ethics of some of the persons who distributed goods for them. We are interested in antitrust strictly.

Mr. Paradise: Thank you, your Honor.

The Court: I forgot who was the defendant in that lawsuit. Whom did you sue?

The Witness: Richfield Oil Corporation.

Mr. Hall: If your Honor please, if I may interrupt, I have the Supreme Court decision here of DeLonge versus Richfield Oil Corporation, et al., in the Supreme Court of Washington, numbered 31116, which is reported in 215 Pac. Rep. 215, the second series, at page 701.

The Court: I see.

Mr. Hall: And if your Honor desires to look at it, you may.

The Court: Oh, no. I am not interested. Who wrote the opinion? Maybe Judge Driver——

Mr. Hall: Mr. Justice Hamley.

The Court: Was Driver on the court at that time? What [fol. 2289] year was it? Who concurred?

Mr. Hall: March 3, 1950.

The Court: Oh, no, he was not on that court. Judge Driver was on the court of the Eastern District of Washington.

Mr. Hall: The judges who concurred in the case were Chief Justice Simpson, and Justices Robinson, Mallery, and Hill.

The Court: Well, that is all right.

Mr. Paradise: Would the court forgive me for just one moment?

The Court: Yes.

By Mr. Paradise:

Q. Mr. DeLonge, it is your understanding, is it not, that Richfield is not the owner of this land that we are talking about but is the lessee?

A. That is right.

Q. Do you know from whom Richfield leased that property?

A. I did. I found that out.

Q. Who was that?

A. Orville Kisor.

Q. Pardon me?

A. Orville Kisor.

Q. That is the same man we have been talking about throughout?

A. Yes.

Q. Mr. Orville Kisor is not only the distributor but he [fol. 2290] is also the owner of the land?

A. No, sir, he is not.

Q. What?

A. He is not the owner of the ground.

The Court: What has he got, the ground lease?

The Witness: He has got the master lease from the Ingham Reed Investment Corporation of Shelton, Washington.

By Mr. Paradise:

Q. But Mr. Kisor has an interest in that property personally paramount to any interest Richfield has, is that not correct?

Mr. Hall: I object to that as calling for a conclusion, your Honor.

The Court: Sustained. It calls for a conclusion of the witness. Go ahead.

By Mr. Paradise:

Q. Is it not correct that Mr. Kisor, then, is the Richfield's lessor?

A. I know now. As far as I am concerned—now, I don't know. I never saw the lease.

Q. No, I am talking about the time you were there.

A. Yes, sir, he was.

Q. During the time you were paying Mr. Kisor this $100 a month on the side?

A. Yes, sir.

Q. And also during the time that Mr. Kisor would not have Richfield change the hoist in the property?

[fol. 2291] A. That is correct.

Mr. Paradise: Yes. That is all.

The Court: All right. Any redirect?

Mr. Hall: No redirect, your Honor.

Mr. Paradise: Just one moment.

The Court: I forgot to take a recess.

The Witness: This has been a long session.

Mr. Paradise: My attention has been called to this fact.

Q. I think you said that the lawsuit was not decided against you?

A. That is right, sir, it wasn't. It was not decided against me.

Q. Was it not true that the jury found that you were not damaged and that you were not entitled to anything?

A. Yes.

[fol. 2292] Mr. Dixon: I think that is wholly irrelevant to this question.

The Court: Well, you lost out, anyway.

The Witness: No, sir. I lost out, but the jury gave me the verdict, sir. The judge decided I was not entitled——

The Court: Oh, I see.

Mr. Hall: May I state the appeal was on the matter of the damages allowed, and not on the question of whether Mr. DeLonge was unlawfully evicted. They did give him a certain sum, the jury did.

Mr. DeMartini: I beg your pardon on that.

The Court: Let's look at the decision.

Mr. Hall: I think that is the best answer, your Honor.

The Court: Yes, let's look at the decision. Delonge v. Richfield Oil Corporation. It is a very complicated case. It is a short case, but a very complicated case. The case was decided on the basis of unlawful eviction, and the damages were limited by the trial court merely to the cost of moving his stuff away, and the Supreme Court held that a refusal of the instruction as to other damages had not been properly excepted to, so that the layman's interpretation is correct. He won the case, he won the moral victory that he was unlawfully evicted, but that he didn't have any damage. That is the way I read this opinion.

[fol. 2293] The Witness: Yes, sir.

The Court: And they sought to establish, as it says,

> ". . . at the time of the trial, plaintiff sought to establish two items of damage: The cost of moving the inventory from the premises; and the loss occasioned by the forced sale of such inventory after its removal from the premises."

Of course, that would be the latter item, the instruction as to the latter item, which was not excepted to. So your lawyers overlooked it. It is very interesting to read this, and I will read from page 702, 215 Pac. Reporter, 2d Series, to show the summary manner in which this transaction was made:

> "On September 1, 1946, Robert J. DeLonge entered into possession of the One Stop Service Station, at

Olympia, Washington, under a lease from Richfield Oil Corporation. The lease contained a non-assignment clause, and provided that either party could terminate the lease on twenty-four hours' written notice. In the summer of 1947, DeLonge became delinquent in the payment of rent to Richfield, and indicated to the latter his willingness or desire to sell the business. [fol. 2294] Both DeLonge and Richfield began looking for a prospective purchaser and each secured one. On September 22, 1947, Richfield's representatives and Stanley Winters, the prospective purchaser Richfield had found, met with DeLonge and Horace DeHoog, the prospective purchaser DeLonge had found, at the service station. Richfield's representatives declined to approve the sale of the business to DeHoog, and insisted that the new tenant be Winters.

"DeLonge worked most of that day taking an inventory of the stock of goods, which inventory was checked by Winters and one of the Richfield representatives. At six o'clock that evening, the Richfield representative orally advised DeLonge that Winters would take over and operate the station at eight o'clock the next morning, September 23, 1947. Witners bought from DeLonge all of the Richfield approved products, in the amount of $1,603.16, then in the station. Winters refused to buy other products which DeLonge then had at the station. DeLonge worked all that night segregating [fol. 2295] and moving to his place of residence the products and articles of personal property not purchased by Winters. Winters took over the station at eight o'clock a. m., September 23, 1947.

"DeLonge thereupon brought this action against Richfield to recover damages by reason of alleged unlawful eviction. The complaint and amended complaint were not (except for paragraph VIII of the amended complaint) made a part of the record before us. However, we understand from the briefs that, at the time of the trial plaintiff sought to etsablish two items of damage: The cost of moving the inventory from the premises; and the loss occasioned by the forced sale of such inventory after its removal from

the premises. Defendant cross-complained for back rental and for merchandise sold to plaintiff and not paid for, the total of both items being $364.55.

"It was stipulated in open court that defendant should have judgment on its cross-complaint as prayed for, and this item was therefore not submitted to the [fol. 2296] jury. As to the complaint and amended complaint, the trial court limited the jury to the consideration of the item of damage based on the cost of moving the inventory from the premises. The jury returned a verdict for plaintiff in the sum of thirty dollars, this sum representing the cost of moving the inventory. Judgment was thereupon entered for the defendant in the sum of $334.55, on the basis of the stipulation and jury verdict. Plaintiff has appealed."

Well, let's read the rest of it:

"Appellant first assigns as error the giving of instruction No. 17, relating to the measure of damage. Only the first sentence of this instruction is set out in the brief. Rule 16(5), Rules of Court, 18 Wash. 2d 18-a, requires that whenever error is assigned upon the giving or failure to give instructions, such instructions 'shall be set out in the brief in full.' This assignment of error therefore cannot be considered. . . .

"Appellant's last three assignments of error concern the trial court's failure to give certain requested in [fol. 2297] structions. Each of these requested instructions relates to damage sustained by appellant because of the necessity of his making a forced sale of the portion of the inventory which he removed to his home. At the time of the trial, on objection by respondent, appellant was not allowed to introduce any evidence to prove this claimed damage. Following this ruling, appellant's exhibit B, which was a copy of the inventory and constituted the only specific evidence as to the items removed to appellant's home, was withdrawn from the jury. At the close of appellant's case, the trial court granted respondent's motion to withdraw

from the consideration of the jury any claim of damage based on the forced sale of the inventory.

"There accordingly being no evidence before the jury as to this item of damage, the proposed instructions, submitting that item for the consideration of the jury, were properly rejected."

But here comes the rub:

"Appellant did not assign as error any of these [fol. 2298] rulings of the trial court which operated to exclude from the jury all evidence on this item of damage. Nor did appellant assign as error the giving of that portion of instruction No. 17, which expressly advised the jury that it could not consider any damages alleged to have been incurred as the result of the loss or the forced sale of appellant's inventory. Under Rules 16(5) and 21, Rules of Court, 18 Wash. 2d 18-a and 21,-a, alleged errors of the superior court will not be considered unless the same be clearly pointed out and discussed in the appellant's brief. . . .

"Had these rulings been assigned as error we still could not have considered them, since appellant did not except to instruction No. 17 on the ground now relied upon, i. e., that this item of damage should not be taken from the jury."

In other words, you did not lose on the merits, because the Supreme Court never passed upon the question of whether you are entitled to damages by reason of the forced sale, and they didn't do that because your lawyer did not comply with the rule of court.

[fol. 2299] So that your interpretation that you lost on a technicality is right. In California you would not have needed these exceptions. In California when a man makes a ruling, and that applies in the Federal Court too, it is supposed to be excepted to, so that if your lawyer overlooked something it would not make any difference.

You lost here because your lawyer overlooked something in the trial court and in the appellate court, and you do not have a decision on that matter. In the lower court they found you were not entitled to prove or that you were not

entitled to submit to the jury the question of the loss you incurred by reason of their refusal to sell to the other party, and forced you to get out in 24 hours.

Now, I am not saying that the higher court would have done any differently, but our system is based upon the proposition that a trial judge may be wrong and that a litigant has not had his day in court unless the higher court has decided upon the merits that the trial court was right.

In this case the Supreme Court was never given a chance to decide whether you were entitled to damages because of the forced sale to people to whom you didn't want to sell. They could have continued it for a month, even under the contract. They could have said, "All right, I will give you a month to get out," but they forced you to do so in [fol. 2300] twenty-four hours, insisting upon that clause which, of course, was in the contract.

The Witness: That is right.

The Court: But the higher court had no right to consider that where you offered the two alternatives, whether their refusal to take your man would have paid you for all and would not entitle you to damages, despite the 24-hour clause.

I know how I would have decided that on general equity principles. I just think this man is entitled to the full benefit of an interpretation of this decision, lest it be believed that he had a final day in court. He did not.

The Witness: Would your Honor indicate that I have a recourse?

The Court: No.

The Witness: That is what I thought.

The Court: I am telling you you lost because you had lawyers who were unfamiliar with the practice, or they were unfamiliar with the rule on appeal. They did not take the proper exception. That is the way it looks to me.

The Witness: Thank you.

The Court: In other words, I am not saying the trial court may not have been right, but I am saying the Supreme Court was not allowed to determine whether the trial court [fol. 2301] was right because your lawyers fumbled the ball.

The Witness: Yes, sir.

Mr. Dixon: May it please the court, before we adjourn I might say to your Honor that the government has six witnesses, all of which are from out of the state, and if we can conclude with them today, it would be appreciated, I am sure, by all of them.

The Court: I haven't taken any recess. I have a luncheon engagement today, the first one in months, but I will be back in time, and then, if necessary, we will go until we complete with them. We will shorten it.

Mr. Dixon: Yes. I am certain the others will not take so long.

The Court: You see, I haven't even had a recess this morning.

Mr. Dixon: Yes, we appreciate that, your Honor.

(Whereupon at 12:15 o'clock p. m. a recess was taken until 2:00 o'clock p. m. of the same day.)

[fol. 2302] Friday, May 18, 1951—2.00 P. M.

The Court: All right, gentlemen.

Mr. Somerville: May I offer Government's Exhibits 19 and 19-A in evidence.

Mr. Paradise: Which are they?

Mr. Somerville: Those are the McRae sales contract papers.

Mr. Paradise: Are these the ones that he testified to or are these additional ones?

Mr. Somerville: Yes, he testified to those. Those were the original papers.

Mr. DeMartini: No objection.

The Court: Which papers are those, McComb's?

Mr. Somerville: No, Gordon McRae who testified yesterday.

The Court: Oh, the man who had the famous name.

Mr. Somerville: Yes.

The Court: Well, it is a famous singer, you know, Gordon McRae.

The Clerk: Are these received, your Honor?

The Court: Yes, it may be received.

The Clerk: 19 and 19-A in evidence.

The Court: I think we ought to say for the record we are not responsible for the grammar of the witnesses. I [fol. 2303] noticed the first thing when I opened here they asked about the figures and he said, "They was written." Even the attorneys sometimes slip and say "who did you see?" when it should be "whom". I hope you put down "whom" for the attorney. I will let you amend the question if a lawyer starts with "who." Just give him credit for "whom".

(The documents referred to were marked Plaintiff's Exhibits 19 and 19-A and received in evidence.)

Era T. Vaughn, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: Era T. Vaughn.

Direct examination.

By Mr. Alexander:

Q. Where do you live, Mr. Vaughn?
A. Las Vegas, Nevada.
Q. Speak up so we can hear you here.
A. Las Vegas, Nevada.
Q. What is your employment?
A. I am a driver-salesman for McQuay Supply Co., distributors of Quaker State oil.
Q. What is the nature of the business of the McQuay Supply Co.?
A. We distribute Quaker State oil.

Mr. Paradise: I am afraid I can't hear you, Mr. Vaughn. [fol. 2304] The Court: Speak a little louder. Haven't you just gone through that Helldorado shouting all over the place?
The Witness: I didn't do much shouting, Judge.
The Court: Well, do your shouting right here so everybody can hear you.

By Mr. Alexander:

Q. What is the nature of your duties with the McQuay Supply Co., Mr. Vaughn?

A. As driver-salesman I make the rounds among the customers, take orders, deliver the orders, also take care of my inventories of our stock that we have on hand.

Q. Do you have care of the orders of the inventories maintained, that is, the company's inventory?

A. Yes.

Q. Are you familiar with the source from which your company obtains the Quaker State oils and greases?

A. It comes direct to us from Oil City, Pennsylvania.

Q. What is the area of operation that your company markets the Quaker State products in, Mr. Vaughn?

A. We have all of the southern Nevada and come down into California as far as Baker.

Q. As far as what?

A. Baker, Baker, California.

Q. In your course of duties——

The Court: Don't you know the town?

Mr. Alexander: Baker, yes, sir.

The Court: It is right at the edge. That is your last [fol. 2305] town before you go to Death Valley. There is Baker, Oregon, too. My friend Judge Claude McCullough of Oregon was born there. His father was a judge there before him. I am saying that for the benefit of the Portland witnesses, giving them a lot of local history.

[fol. 2306] By Mr. Alexander:

Q. Mr. Vaughn, your duties as a driver also include contacting service station outlets?

A. Yes, sir.

Q. How long have you been employed with the McQuay Supply Company?

A. I started in in January, 1949.

Q. Have you made any calls on service station outlets which bear the colors of the Richfield Oil Corporation?

A. Yes, sir.

Q. Calling your attention to a service station located at Fremont Street, 5th and Fremont Streets, Las Vegas,

operated by George Frey, have you ever called on that service station?

A. Yes, sir, I have.

Mr. DeMartini: Will you stipulate that is an L-O station?

Mr. Alexander: So stipulated.

By Mr. Alexander:

Q. Have you had any conversations with Mr. Frey in connection with either the attempt to sell, or actually have you made any sale of Quaker State products?

A. I have attempted to.

Q. When did these occur, Mr. Vaughn?

A. Shortly after I went to work for McQuay Supply. That would be along about February, of 1949, that I began to call on him trying to sell him Quaker State. Along about June he told me that it was simply no use, he was [fol. 2307] afraid of his lease, and he wished I wouldn't, so I discontinued.

Q. Have you had any other conversations with Mr. Frey, other than these two you refer to?

A. Well, I called on him several times during that time, at which time he told me—he said he had handled it at one time, but that Richfield had made him take it out, and that he was afraid of his lease, so he was afraid to put it back in.

Mr. Paradise: You let your voice drop, Mr. Vaughn, and we can't hear the tail end of it.

The Court: Yes, speak up.

The Witness: He said he was afraid to put in back in, that he was afraid of his lease.

The Court: That is right. I can tell you don't frequent the crap tables.

The Witness: No, I don't.

The Court: Calling the next number to make your point. You haven't learned to talk to the dice?

The Witness: Not very well, I haven't.

The Court: You don't talk to them?

The Witness: Have you got a pair of dice, your Honor?

The Court: No, but it is good for developing your voice, you see, you learn to talk.

By Mr. Alexander:

Q. Now, calling your attention to a service station located [fol. 2308] at 629 South Main Street, Las Vegas, operated by Charles E. Ronnow, have you ever called at that station?

A. Called on Mr. Ronnow? Yes, sir.

Mr. Alexander: Will counsel stipulate that is an L-O station?

Mr. DeMartini: So stipulated.

By Mr. Alexander:

Q. Have you had any conversation with Mr. Ronnow with respect to selling or attempting to sell him Quaker State oil?

A. Yes, I did sell to Mr. Ronnow.

Q. Have you had conversations with him?

A. Yes. I asked him about putting out a curb sign and can racks, but he laughed and said they were not allowed to display anything except Richfield approved products.

Q. Have you made sales of Quaker State products to Mr. Ronnow?

A. Yes, I make them to Ronnow.

Q. Are these products that you sold to Mr. Ronnow openly displayed on his premises?

A. No. He keeps a few cans hid in the filling station. The rest of them are locked up in the warehouse on the back of the lot.

Q. Now, Mr. Vaughn, calling your attention to a service station located at 501 South Fifth Street, on Fifth and Clark [fol. 2309] Streets, Las Vegas, operated by Mr. Newell Kimball——

Mr. Alexander: Will counsel stipulate that also is an L-O station?

Mr. Paradise: So stipulated.

By Mr. Alexander:

Q. (Continuing) —have you ever made sales of Quaker State products to Mr. Kimball?

A. Yes, I have.

Q. Are you currently making sales of Quaker State to him?

A. Well, we make small sales. He only takes two cases at a time, due to the fact that is all the room he has for keeping that amount hid. He would rather take five and get his quantity discounts, but he doesn't have room.

Q. Have you had conversations with him in connection with purchasing Quaker State?

A. Yes.

Q. In the discussions has there been anything said about the quantities he might purchase?

A. Yes. I would suggest his taking five cases, where he would get his quantity discount, and that was the reason that he gave me for not desiring that, and he says that he only had room for two cases under the counter, and he says, "You know, we have to keep them hid."

Q. These three service station operators you testified to, has there been any discussion in your conversations with [fol. 2310] them as to the quality or comparability of these products as compared with Richfield petroleum products?

A. Well, I never felt it ethical to run any man's products down, and the way I have always talked to them was, "You have just as good an oil as I have, but it doesn't suit everybody, and there is going to be people coming through that want your oil, and there is people coming through wants my oil, and if you have all these different kinds that are in demand, then you are prepared to serve them with what your customer wants."

Mr. Alexander: No further questions.

The Court: Oh, you make him work. Come on, Mr. DeMartini.

Mr. DeMartini: O. K. We can't think up a question to ask the witness, your Honor.

The Court: I thought you knew what the witness was going to testify to in advance.

Cross-examination.

By Mr. DeMartini:

Q. Did you ever attempt to sell your oils to Standard Stations, Inc. stations, Mr. Vaughn?

A. I have talked to them. That is, you mean the company-operated stations?

Q. That is correct.

[fol. 2311] A. I have talked to them, but have never been able to get any oil in there.

Q. What did they tell you?

A. That it is a company-operated station, and that the company doesn't allow them to.

Mr. DeMartini: That is all.

Mr. Alexander: One further question, your Honor.

Redirect examination.

By Mr. Alexander:

Q. Mr. Vaughn, do you solicit the Chevron stations of the Standard Oil Company?

A. Yes, sir.

Q. Are you able to sell them Quaker State oil products?

A. I don't believe there is one in my immediate territory there, except the one out in Henderson, that I don't have Quaker State into.

Q. Mr. Vaughn, are these products openly offered to motorists and the public?

A. Yes, they are. I have offered my curb stands and can racks.

Mr. Alexander: That is all.

The Court: I think John Hall would be glad to hear that. Step down.

(Witness excused.)

[fol. 2312] The Court: All these witnesses, unless you have arranged for them to stay, are excused as soon as they are through. For your benefit, I will say we are going to run through a large group of you so that you will not have to stay over until Tuesday. Not that you are not welcome in town, but probably you can find more excitement at Las Vegas and other places over the week-end than you can here, and probably cheaper.

Mr. Greer: Mr. Ellena.

PETE ELLENA, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?
The Witness: Pete Ellena.
The Clerk: Will you spell your last name, please?
The Witness: Ellena, E-l-l-e-n-a.

By Mr. Greer:

Q. Where do you live, Mr. Ellena?
A. 721 Lander Street, Reno, Nevada.
Q. What do you do for a living, sir?
A. I am a service station operator.
Q. Have you ever leased a service station site from [fol. 2313] the defendant, Richfield Oil Corporation?
A. I have.
Q. When was that, sir?
A. That was around August 29th or September the 1st, in 1948.
Q. How did you happen to enter into negotiations with Richfield, Mr. Ellena?
A. Well, the Richfield Oil Corporation was building some new stations there in Reno. They were building two in Reno and one in Sparks. So I seen Mr. Lani, the TBA distributor, and also Mr. Reed, the manager, and they told me I could have any station in Reno, or the one in Sparks.
Q. You say you spoke to Mr. Reed?
A. Yes, sir.
Q. Is that Mr. Randolph Reed?
A. Yes, sir, Randolph Reed.
Q. Is he the district manager?
A. Yes, sir.
Q. You asked him if you could lease one of the new stations that were being built?
A. Yes, sir.
Q. What is the address of the one that you leased?
A. The one I took was at 895 South Virginia.
Q. How much was your investment?

A. Around $3,000.

[fol. 2314] Q. What arrangement did you make for paying flat rent?

A. Well, I had a lease that called for $50 a month flat rent, and one cent for every gallon over 5,000 gallons.

Q. Did you look at your lease form before you signed it,—read it over?

A. What is that?

Q. Did you read your lease over before you signed it?

A. Well, before I took the station, they never gave me the lease, but I saw one before. I knew what the lease was.

[fol. 2315] Q. I see. Did you know that there was a 24-hour cancellation clause in that lease?

A. Oh, yes, you bet.

Q. Did you ask Mr. Reed what that clause was in there for?

A. I asked Mr. Reed if I could get a longer lease instead of the 24-hour lease.

Q. What did he say to you?

A. "Go ahead. Don't worry about it. Richfield Oil Company is a good company. You don't have to worry about that 24-hour lease." That is what he told me.

Q. Were you told about the Richfield TBA program?

A. I was told plenty of times.

Q. What was the name of your TBA distributor?

A. Les Lani.

Q. Did Mr. Reed tell you anything about where you should buy your TBA products?

A. Yes, sir.

Q. What did he tell you?

A. He told me I was supposed to purchase my tires, batteries and all accessories from Les Lani out of the Richfield plant there in Reno.

Q. Did you purchase all your TBA from him?

A. I did when I first started up after I went in the station.

Q. Did you continue to purchase it all from him?

[fol. 2316] A. No, I didn't.

Q. Who did you buy from?

A. Well, I bought from different parts houses and I also bought from Reno Vulcanizing Works.

Q. What kind of tires did you buy from the Reno Vulcanizing Works?

A. Goodyear tires.

Q. Were Goodyears the same price that you would have purchased from Mr. Lani?

A. Yes, sir.

Q. Why did you purchase from Reno Vulcanizing Works instead of him?

A. Well, I got them from Reno Vulcanizing because that was always open, and when I needed tires I could call them up and he would bring them to me in about five or ten minutes. Les Lani, he was always out of town and you never could get hold of him.

Q. Did you ever handle any Quaker State oil, Mr. Ellena?

A. Yes, sir.

Q. Why?

A. Well, I had to on demand from my customers, for my bread and butter.

Q. Did any representative of Richfield ever speak to you about handling that Quaker State oil?

A. Yes, sir.

[fol. 2317] Q. Who did?

A. Mr. Hunt.

Q. Who was Mr. Hunt?

A. He was the new manager of Richfield bulk plant after Mr. Reed left.

Q. When did Mr. Hunt speak to you about it?

A. Well, I can't quite figure out what month it was. I know right after Mr. Reed left. It was in the spring on that "go places" contest with Richfield.

Q. In the spring of 1949?

A. Yes, in the spring of 1949.

Q. Did this conversation take place at your station?

A. Yes, sir.

Q. What did he say to you?

A. Well, he just walked in the service station there and I had some oil on the shelves there, and he took a look at the oil there and he told me to move it.

Q. Did he say anything to you about your TBA purchases?

A. Yes.

Q. What was it?

A. Well, he asked me how come I was not buying batteries from him and stuff. Well, I did buy batteries from him, but half of his batteries I bought from him were all dead. They were no good.

Q. Did you keep on handling Quaker State oil?

[fol. 2318] A. Yes.

Q. What was the name of your merchandiser, Mr. Ellena?

A. The first merchandiser was Jack Manford and the other one was McGowan.

Q. Did Mr. McGowan ever speak to you about Quaker State?

A. He told me a couple of times that Mr. Hunt told him to tell me to hide that Quaker State or don't buy any more oil there, you know, don't handle it.

Q. I am going to direct your attention to the month of August, 1949 and ask you if Mr. McGowan ever came to see you at your station during that month?

A. Yes. It was in the last few days of August 1949. McGowan came into my station one day and he hung around all day. So I asked him, you know, what was wrong. And he never said nothing. So he came the following day and he came the following day, and about the fourth I asked him what was wrong. So he asked me if I would go for a cup of coffee with him. So I went downtown and got a cup of coffee with him. And he said, "Mr. Hunt told me to tell you that you are going to have to leave within 24 hours."

Q. What did you say to that?

A. I couldn't say very much. I was just too passed out. I couldn't believe it.

Q. Did you tell him that you had been told that 24-hour cancellation clause was not to be used?

[fol. 2319] A. What is that?

Q. Did you tell him what Mr. Reed had told you when you came in?

A. Oh, no. I didn't tell him what Mr. Reed told me, no.

Q. Did Mr. McGowan say anything else at that time in explanation of the news he had for you?

A. Well, Mr. McGowan told me that I was one of the best operators in Reno, Nevada, that I kept my station clean, took care of my customers, and that he couldn't

help it. It was a damn, dirty shame to pull a trick like that on me, that he was just taking orders from Mr. Hunt.

Q. Did he make that statement to you at the time he told you to leave?

A. Oh, yes, he did.

Q. Who was to succeed you in that station?

A. Well, I asked Mr. McGowan. I says, "Who is going to take over?" "Oh," he said, "we have six or seven operators over there that want your service station."

Q. Did you try to contact any of the top officials of the defendant corporation to find out why you were being cancelled?

A. Well, that night I couldn't get hold of my lawyer, so I went down to the Western Union and I sent a night letter to Richfield Oil Corporation in Los Angeles.

Q. Did you ever get any response to that communication?

[fol. 2320] A. No, sir.

Q. Have you gotten any response to it yet?

A. No, sir.

Q. Does the name Bob Marsh mean anything to you?

A. Yes, it does.

Q. Who was Bob Marsh?

A. Bob Marsh was one of the operators that was to take my station over.

Q. Did he actually take it over?

A. Yes, sir.

Q. What kind of financial arrangements did he make about purchasing your inventory?

A. Finance?

Q. How much money did he give you?

Mr. Paradise: I object to this as irrelevant unless the defendant is connected up with it.

The Court: Overruled at present. Go ahead. Who was present? Were any of Richfield's men there when you were checked out?

The Witness: Yes, sir.

The Court: All right, go ahead now and tell us.

By Mr. Greer:

Q. How much money did he give you?

A. Mr. Marsh gave me a check for a down payment, I think, of about $400. I think it was either $400 or $450.

Q. Did he make any statement to you about that check [fol. 2321] at the time he gave it to you?

A. Yes, sir. He told me if I wouldn't mind, he said if I would hold it for him for three or four days because he didn't know whether he had the money in there or not.

Q. What was the value of your inventory at that time?

A. It was around $3,300.

Q. At the time you went into this station was anything said to you by Richfield representatives about buying a coke machine?

A. Yes, sir.

Q. What was said to you?

A. Mr. Reed told me. He says, "You might as well buy a Coca-Cola machine because you have got to have one. It brings you business." Which he is right, it does bring you business.

Q. Did you buy one?

A. Yes, sir.

Q. How much did it cost you?

A. About $278.

Q. Did any discussion arise about the time you had to turn your business over to Mr. Marsh about that coke machine?

A. Yes, sir.

Q. What was said?

A. Bob Marsh said, "I don't want the coke machine."

[fol. 2322] Q. Did he take it?

A. No, sir.

Q. What did you do with it?

A. I took it over to my mother-in-law's house.

Q. Did you have an adding machine?

A. Yes, sir.

Q. Did Mr. Marsh take that?

A. No, sir.

Q. Did you have any foreign oils, any non-Richfield oils in your station at the time that you had to dispose of it?

A. Yes. I had Ring-Free MacMillan oil.

Q. What happened to that MacMillan oil?

A. Mr. Fields came down from Yuba City, California, and he told me, you know, he knew that he would have to pick up the oil, so he paid me in cash and I gave him the oil.

Q. Was Mr. Fields the representative of the MacMillian Oil Company who had sold you that oil?

A. Yes, sir.

Q. Did he come from Yuba City, California to Reno, Nevada to pick it up?

A. Yes, he did.

Cross-examination.

By Mr. DeMartini:

Q. You leased this from Richfield on an L-O basis, didn't [fol. 2323] you, Mr. Ellena?

A. L-O, leased out?

Q. Yes.

A. Yes, sir.

Mr. DeMartini: May it be stipulated that Mr. Ellena held Form 542 lease dated September 10, 1948 on print date 1-47?

Mr. Dixon: With a minimum rental of what amount?

Mr. DeMartini: With a minimum rental of $50 plus one cent over 5,000.

Mr. Dixon: Each month?

Mr. DeMartini: That is right. $50 per month plus one cent over 5,000, or the equivalent of one cent a gallon rent.

Mr. Dixon: So stipulated.

By Mr. DeMartini:

Q. This was a new station, wasn't it, Mr. Ellena?

A. Yes, it was.

Q. It had never been open before?

A. That is right.

Q. You were advised at that time, before the time that you were put in there as a lessee, that you had to operate in accordance with Richfield policies? You knew that, didn't you?

A. No, they didn't tell me that, not Richfield policy, no. [fol. 2324] Q. You knew there was a 24-hour termination privilege?

A. I knew that because I had a Richfield station before.

Q. You were expected to sell Richfield products there?

A. Well, certainly.

Q. You were told to wear uniforms?

A. Yes, I was.

Q. Wasn't that one of the points of controversy, that you refused to wear uniforms after you went into the station?

A. No, no.

Q. Did you wear uniforms at all?

A. I did wear uniforms.

Q. Wasn't there some controversy with Richfield with respect to your failure to comply with their advertising programs or give way to Wildflower programs, summer shield and winter shield programs?

The Witness: Will you repeat that question, please?

The Court: Read the question.

(Question read by the reporter.)

A. Yes, there was.

By Mr. DeMartini:

Q. You refused to obey their directions in that regard?

A. I couldn't obey their directions on that one deal there because I just couldn't do it. Do you want me to tell you what it is?

Q. Yes, go ahead.

[fol. 2325] A. Mr. Reed—they were having this Richfield Go Places contest and I already had about 15 cases of Richfield oil. Well, he wanted me to buy about a hundred cases and keep it in his warehouse and pay cash for it, and when I wanted it, go over there and pick it up. I don't do business that way. In other words, he wanted to push this stuff onto me. I don't mind handling Richfield products, but I didn't want to have an over-stock of it.

The Court: What was your average stock that you carried?

The Witness: Of oil and gas?

The Court: Yes, of oil.

The Witness: Well, I always carried about—well, let's see—15 cases. I always had over a hundred gallons of oil.

The Court: How much in a case—how many in a case, 12 or 24?

The Witness: There is 24 six-gallons in a case.

The Court: He wanted you to carry how many?

The Witness: Oh, he wanted just, you know—he knew I had money, you see, and he wanted me——

The Court: Oh, I see.

The Witness: He wanted me to buy a hundred cases so that it would look good for him, you see, for the people down in San Francisco.

The Court: But you couldn't see it?

[fol. 2326] The Witness: Oh, no, I couldn't see that. No, sir.

The Court: All right.

By Mr. DeMartini:

Q. How many customers did you have for Quaker State oil?

A. How may what?

Q. Customers did you have for Quaker State oil?

A. How many customers?

Q. Yes.

A. Oh, I didn't have too many, but what I did have I took care of them.

Q. How many did you have?

A. Maybe about five or six a month, not very many.

Q. Well, did you have regular customers who came there and wanted it?

A. Yes. That is right. I tried to sell them on Richfield Penn and Richfield Lube, but they see that name "Quaker" name, so you can't lose them as a gas customer.

The Court: How would you say in percentage? What were your Quaker State sales in percentage of your sale of oil?

The Witness: What percentage?

The Court: Yes.

The Witness: Oh, I don't think it could be over about one per cent.

The Court: About one per cent?

[fol. 2327] The Witness: Yes. I didn't buy very much of it.

The Court: In other words, you were pushing their products?

The Witness: Oh, sure.

The Court: But you wanted the privilege of selling the others to keep a customer, was that the idea?

The Witness: That is right, yes, sir.

The Court: You were not deliberately going out and overstocking yourself with the other?

The Witness: Oh, no. I should say not. After all, Richfield gave me the station. Why should I push the other products?

The Court: Well, I just wanted to find out.

Mr. DeMartini: That is all.

The Court: All right. Any questions?

Mr. Greer: Just one, your Honor.

Redirect examination.

By Mr. Greer:

Q. These uniforms you have been asked about, Mr. Ellena, who purchased those uniforms?

A. Mr. Randolph Reed—that is his name, I think—I gave him the money and he told me to order them through Richfield.

Q. What I mean is who paid for them?

A. I paid for them.

[fol. 2328] Q. You paid for them.

A. Yes, sir.

The Court: I forget what color they are. Are they that dull green? They look like the old fashioned uniforms that we used to wear in the war?

The Witness: No, sir.

The Court: In the first World War?

The Witness: It is that terrible looking blue of the company.

The Court: I was going to say, I didn't know anybody would object to the uniform. I remember going into a little station about 1:00 o'clock in the morning, and evidently the wife had come along to help him, and it was cold and she was very proud of the big jacket she was wearing, you know, to keep her warm.

Mr. Greer: Stand aside, sir.

The Court: All right, step down. Call your next witness.

CLARK FERRIS WAGNER, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Clark Ferris Wagner.

Direct examination.

By Mr. Greer:

Q. Where are you from, Mr. Wagner?

A. Taft, California.

[fol. 2329] Q. What is your occupation, sir?

A. Owner and operator of a Union Oil service station.

Q. Have you ever leased a service station outlet from the defendant Richfield Oil Corporation?

A. I leased two of them.

Q. Where did you lease those stations?

A. One at 7th and Center Street at Taft, and the other at 4th and Kern Streets, Taft.

Q. With reference to this station at 4th and Kern when did you enter into that lease?

A. As far as I remember, it was January the 17th or February the 17th of '42.

Q. Do you recall approximately what your investment was?

A. Well, down there I combined two stations at the time and I would say——

Q. Did you move your inventory from your first station?

A. That is right.

Q. To your new station?

A. That is right.

Q. How big an inventory did you have?

A. Oh, I would say about, from the one station, about $1700, and I moved that down and the other one cost me, I think, about sixteen or seventeen hundred to buy.

Q. Would you say that you had a total investment of [fol. 2330] something over $4,000?

A. Around approximately $4,000.

Q. What does the name Frank Kelly mean to you, Mr. Wagner?

The Court: A good Irish name, I guess.

A. Frank Kelly was the Richfield Oil Corporation representative that called on me.

Q. Was he a merchandiser?

A. I believe so at the time.

Q. Did you ever handle any Pennzoil or Quaker State in this service station, Mr. Wagner?

A. Lots of it.

Q. Where did you keep that foreign oil?

A. Kept it hid under the shelf.

Q. Did you keep it hidden?

A. Rags all around it.

Q. Would you tell the court why you handled Pennzoil and Quaker State?

A. Well, I had several accounts, especially I had Kern Mutual Telephone Company there at Taft and they had to have Pennzoil, that is all, and I couldn't afford to lose the business.

Q. How much business did that Kern Mutual Telephone Company account mean to you?

A. Oh, they ran from $150 to $250 a month.

[fol. 2331] Q. Were you ever cautioned by Mr. Kelly about handling Pennzoil and Quaker State?

A. I would say five or six times.

Q. What did he say to you?

A. He said, "Mr. Wagner," he said, "if you don't get that foreign oil out of here one of these days, I will have to serve the 24-hour notice on you."

Q. Are you familiar with the Richfield TBA program?

A. Yes, sir.

Q. Where was the Richfield TBA distributor located?

A. Well, originally it was in Bakersfield and then they changed it to Taft, the Richfield Oil distributor, Everett Olin.

Q. Did you handle any tires, batteries and accessories that were not Richfield approved?

A. Lots of them.

Q. What were some of them?

A. I handled Firestone tires, U. S. Royal tires, Armstrong tires. I handled Brake Block fan belts, A-C spark plugs, Fram oil filters, Delco batteries, Exide batteries.

Q. Were you ever cautioned by Mr. Kelly or any other representative of Richfield about that unauthorized TBA?

A. Yes, several times.

Q. What did he say to you about that?

A. He said: "Get that out of here."

[fol. 2332] Q. Mr. Wagner, directing your attention——

The Court: I did not quite get the significance of the $150 to $250. I lost the connection.

The Witness: That was the Kern Mutual Telephone Company. That was one of my high accounts and they insisted on Pennzoil.

The Court: Incidentally, Taft is an oil town?

The Witness: That is right.

The Court: And you have varied influxes of workers, haven't you?

The Witness: Yes, sir.

The Court: So that people who may come from other states, who come to work in the oil fields when there is a greater demand, they have their own ideas about oil and do not want to be confined to certain particular products, isn't that true?

The Witness: Right, sir. That is right.

The Court: It would be truer than of operating a station in a town, even at Bakersfield, for instance, there would not be a likelihood of a change of patronage?

The Witness: Bakersfield is just about the same type of town. Ours is just a little smaller.

The Court: But there is an overturn of patrons?

The Witness: A terrific overturn.

The Court: So that the likelihood of having set customers

who always want the same thing is not so great as in other [fol. 2333] cities?

The Witness: That is right, yes, sir.

The Court: All right.

By Mr. Greer:

Q. Mr. Wagner, directing your attention to the morning of July the 27th, 1947 would you tell the court what happened that morning?

A. I opened the station at 7:00 o'clock in the morning and up drove Mr. Kelly, and he presented me with this 24-hour letter notice. And he said to me, he says, "Mr. Wagner," he says, "I warned you this was coming if you didn't get rid of the foreign products."

Mr. Greer: I ask that this be marked Government's Exhibit next in order.

The Court: Go ahead, finish your conversation.

The Clerk: Government's Exhibit 21 marked for identification.

(The document referred to was marked Plaintiff's Exhibit 21 for identification.)

The Witness: That was all. That was enough for me.

The Court: So you got notice. When did you move out?

The Witness: Oh, he gave me an extra day. He says, "I happen to have a lot to do today." He says, "Would it be all right if I put you out Wednesday?"

Mr. DeMartini: May I see it, Mr. Greer?

Mr. Greer: I will show it to you but I want to ask the witness a question about it first.

[fol. 2334] Q. Mr. Wagner, I show you this paper and ask you what it is?

A. That is the 24-hour notice, the one I received.

(Document shown to counsel for defendant.)

Mr. Greer: Your Honor, we offer this in evidence.

The Court: All right, it may be received.

The Clerk: 21 in evidence.

(The document referred to was marked Plaintiff's Exhibit 21 and received in evidence.)

By Mr. Greer:

Q. What did you do after Mr. Kelly told you you would have to leave, Mr. Wagner?

A. Well, that night I called Mr. Cecil Burgner. I think he was down at Pasadena at the time.

Q. Who was he?

A. He was the fellow that gave me my first job with Richfield back in 1936.

Q. What did you tell him?

A. Well, I just told Cec that, "I think there has been a little injustice done there," and if he could help me out I would appreciate his help.

Q. Did you come down to Los Angeles to talk to any representative here?

A. No. He drove up to Bakersfield where Mr. Frank Kelly's headquarters were and he talked to him from about 5:00 o'clock in the afternoon until about 11:00 o'clock at night, trying to convince him that he should leave me in [fol. 2335] there. And they went home at 11:00 o'clock and he told me he was not able to do a bit of good with Mr. Kelly.

Q. Did you subsequently come down to Los Angeles to talk to officials here?

A. Well, first, I called, I think, Mr. Foster or somebody in Los Angeles that was above Mr. Kelly. I called him but he was going fishing and didn't want to bother with me.

Q. What did you do then?

A. So then, Friday, after I had left my station and they had put me out, I came down to Mr. Dinkins' office, and that was the vice-president of the company, and talked to him for about 15 minutes. And when I walked in he said, "How are you, Mr. Wagner?" He says, "How are things in Taft?" I said, "Well, they are not so good. I don't have any Richfield station any more." So then he wanted to know what it was all about, so he referred me to Mr. Bill King, so I had a long talk with Mr. King and we talked for about three hours.

[fol. 2336] Q. Did you explain to him why you were handling Quaker State oil, Mr. Wagner?

A. Yes. There was Pennzoil, too. I handled Pennzoil, too.

Q. Did you tell him about your Telephone Company account?

A. Yes, sir. I told him about that account, and he said, "Well, that's a pretty nice account." He says, "I think I would be tempted to hide a little of that under my self, too."

The Court: They were all sorry, weren't they? How did you end up?

The Witness: Well, you see, when I went down to see Mr. King, I wasn't bitter or nothing, because, after all, I am young. I knew I could make a living, but the thing why I went down to see about it was that I wanted to have a clean record. I didn't want them to be carrying anything on my record.

The Court: You went down, and what did they say about the reason?

The Witness: He didn't give me no reason.

The Court: I see.

By Mr. Greer:

Q. Did you have any intangible property in accounts receivable at the time you were discontinued?

A. I had out, I would say, $1500, and when I wound up [fol. 2337] I think I still had about $700 on the books.

Q. Were you able to collect those accounts?

A. No, sir; still got them.

Mr. Greer: The witness is with you.

Cross-examination.

Mr. DeMartini: The first station lease was dated January 14, 1942, on Form 542, bearing print date 2-41. Will it be so stipulated?

Mr. Greer: So stipulated.

Mr. Dixon: Was there a minimum rental?

Mr. DeMartini: And the minimum rental is $110, with one cent over 10,500 gallons per month.

By Mr. DeMartini:

Q. I will show you an amendment, dated January 17th, 1942, which calls for a rental of $110 flat. That is your signature, is it not, Mr. Wagner?

A. That's right, sir.

Q. And an amendment dated October 3, 1942. I am sorry. I will have to go back of this.

The first amendment was made May 8, 1942, and provided for a rental of $110 flat. The second was dated October 3, 1942, and called for a rental of $75 flat, and a third amendment, dated January 30th, 1942, which called for a rental of $1 flat per month, and an amendment dated March 29, 1944, which called for a base rental of $75 per month, [fol. 2338] with a gallonage rental of one cent over 7500 gallons per month, or one cent a gallon. What was the reason for those amendments?

A. Gas rationing.

Q. So your rent was reduced as your business decreased because of gas rationing?

A. That's right.

Mr. DeMartini: I think, to complete the record, because you have a notice of termination in there, Mr. Greer, I had better show that there was a subsequent lease dated January 1, 1946, bearing print date 11-44, calling for a rent of $75 per month, with one cent per gallon over 7500 gallons per month.

Mr. Greer: Yes, sir. Do you have the lease here?

Mr. DeMartini: Is it stipulated that was the last lease and the lease which was terminated by the notice? Is that correct?

Mr. Greer: So stipulated.

By Mr. DeMartini:

Q. In the interim period, Mr. Wagner, you were in the service, weren't you?

A. Yes, sir.

Q. And there were leases executed with Alice Wagner, who is your wife, is that correct?

A. My wife.

Q. And Frank M. Wagner?

A. That's my brother.

[fol. 2339] Q. Now, it is true, is it not, that at or about the time of termination, you had some controversy with the City of Taft over the washing of cars, which violates an ordinance of the City; is that correct?

A. I believe you will find you have a letter on that where the City held that there was no responsibility there on me at all.

Q. There was some discussion with Richfield with respect to that, was there not?

A. I believe there was.

Q. Didn't they give that as one of the reasons for termination?

A. No, they never said that was a reason.

Q. How much of this competitive oil did you sell a month?

A. Well, I would say—according to Richfield oil?

Q. Yes.

A. I would say I would sell one quart to ten.

Q. You would sell one quart of the competitive oil to ten of Richfield?

A. Yes, sir. I just guess at that figure. I can't bring it right down. I never kept the figures on it.

Q. How long did they object to your selling this competitive product?

A. Ever since I have been in there running a Richfield [fol. 2340] service station.

Mr. DeMartini: I think that is all.

The Court: Step down, Mr. Wagner.

Mr. Hall: Just one moment, your Honor. There was a document we want to look at.

Mr. Greer: Just one more question, your Honor.

Redirect examination.

By Mr. Greer:

Q. Mr. Wagner, with reference to the question asked you about the reduction of your rent during gas rationing, do you happen to know whether or not Richfield's rent was also reduced during that period?

A. I do not know.

Mr. Greer: Will counsel stipulate that it was?

Mr. DeMartini: I will not. I don't know.

I will stipulate that we had a number of reductions during that period.

The Court: The main point is this: He is not interested in the other reductions, but is in this. Your records will probably show.

Mr. Paradise: We will be glad to ascertain it.

The Court: Pardon?

Mr. Paradise: We will be glad to ascertain it, your Honor, and advise counsel.

[fol. 2341] The Court: I hope your landlord had the good sense to do that, because I know of some fellows who lost valuable leases because they did not. One of them, right in Palm Springs, and I forget what company it was, would not make a reduction in the rent, so the fellow moved out and bought a place across the street, and built a bigger unit. I don't think it was yours. I think it was Texaco, in Palm Springs, just as you leave.

Mr. Paradise: It may be that this was a fee-owned station, unless counsel has some information to the contrary, but we will find out.

The Court: All right. While you were gone, was it your wife and your brother who ran it?

The Witness: That is right.

The Court: Or her brother?

The Witness: My brother.

The Court: Your brother it must have been, because the name is Wagner. Did they run the station while you were gone?

The Witness: Yes, sir.

The Court: Then the reduction was not on account of your being in service, it was on account of rationing?

The Witness: The reduction was because of the gas sales. They only delivered so much gas.

The Court: Do you know whether they kept the station [fol. 2342] open all the while you were gone?

The Witness: Yes, sir.

The Court: I mean regular hours?

The Witness: Yes, sir.

The Court: They didn't curtail the hours of opening?

The Witness: The only thing is we ran out.

The Court: And if they ran out of gas, they put up the "Sold Out" sign?

The Witness: I only sold gas one hour a day.

The Court: What did you do with the rest of the time?

The Witness: That would give us time to lube cars, because in one hour I would sell all the gas I had.

The Court: You would sell your quota?

The Witness: Yes, sir, and we would lube cars, fix tires, and so forth.

Mr. Greer: Will you mark this, please?

The Clerk: Government's Exhibit 21-A, marked for identification.

(The document referred to was marked Plaintiff's Exhibit 21-A, for identification.)

Mr. Greer: Your Honor, the government offers this exhibit 21-A, for identification, in evidence. It is a letter which purports to be from the Mayor of the City of Taft, California, to the defendant corporation, which was returned by the defendant under the second subpoena duces [fol. 2343] tecum, paragraph 2, item 40.

Mr. Paradise: Objected to as immaterial.

The Court: Let me see what bearing it has.

Mr. Greer: We think it is pertinent under the cross-examination, your Honor.

The Court: We will see. We will see what the Mayor said.

(The document was handed to the court.)

The Court: I don't know. If any defense were based upon the letter to which the Mayor refers, I think this might have bearing. Until that appears in the record, I don't know. I haven't heard anything about any excuse having been given other than what the witness has testified to as the reason for the severance. Let this keep its number for identification. If anything should develop later on relating to this, it might become material, but in the present state of the record, I think it is immaterial. Objection sustained.

Mr. DeMartini: Are you through?

Mr. Greer: Yes.

Recross-examination.

By Mr. DeMartini:

Q. One further question. You spoke of an investment of $4,000 in the service station. What did that consist of?

A. That consisted of all equipment that wasn't on the [fol. 2344] lease. The fellow that I bought from had quite a lot of equipment, a lot of tools, and he had an awful good stock, he was a good service station man. His name was Mr. Humphreys. He is a railroad man today, and he had a terrific stock. I paid $2600 to get in there.

Q. That consisted of stock and movable equipment, tools and grease guns, things of that nature; is that correct?

A. That's right.

Q. By "stock," I mean inventory?

A. Yes, sir.

Q. Of gasoline products?

A. Well, mostly stock, and lots of equipment, tools, jacks.

The Court: Those became handy, didn't they, when you went in there?

The Witness: No, because we had too many service stations closed at the time, you see, there was only one out on G-10, and there was no demand for any of those things. The junk yards are full of them. I just combined two stations into one. That station was closed, I don't know how long. They can give you the figures on it.

Mr. DeMartini: That is all.

Mr. Greer: Stand aside.

(Witness excused.)

[fol. 2345] The Court: Call your next witness.

Mr. Somerville: The government calls Mr. Sheldon.

Verlin G. Sheldon, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?

The Witness: Verlin G. Sheldon.

The Clerk: The first name?
The Witness: V-e-r-l-i-n, Verlin.
The Clerk: And the last name?
The Witness: S-h-e-l-d-o-n.
The Court: Now, who is doing this?
Mr. Somerville: We have some question on documents, your Honor.
The Court: I thought you had disappeared. You boys switch on me so often, I forget who is who.
Mr. Greer: Will you mark this for identification, please?
The Clerk: Government's Exhibit 22, marked for identification.
Mr. Dixon: Perhaps you had better make it 17-C, please. Oh, what was the last one? Will you connect it up with the [fol. 2346] last one?
The Clerk: Government's Exhibit 21-B, for identification.
Mr. Dixon: Yes, that ties up the letter.

(The document referred to was marked Plaintiff's Exhibit 21-B, for identification.)

Mr. Greer: Your Honor, in connection with the Government's offer of its Exhibit 21-A, for identification, we have another letter to Mr. J. T. Foster, an official of the Richfield Oil Corporation, from Frank Kelly, who is identified in the evidence as the merchandiser in Taft, with reference to the last letter, your Honor, which was rejected in evidence as 21-A, and I wonder if your Honor would consider this letter and see if that prior exhibit would not be admissible.
The Court: This is not in yet.
Mr. Greer: We offer that in evidence, your Honor. We offer both letters together.
The Court: That is getting on the bandwagon. You want this other one to take a ride on the coattails of this one. Let's take a look at it and see what it is.
This is clearly admissible. I will allow this.
Mr. DeMartini: No objection to that.
Mr. Paradise: There is no objection to that.
The Court: No. But let me look at the other one in the light of this.
[fol. 2347] I think there is one paragraph in the letter

that bears upon the preceding letter, and because Kelly is complaining that he was told by the City Council not to create a hazard, and the Mayor says that their idea was not to stop him from washing cars, as Kelly wanted to do, but to provide him with a means to run off the water. I think it bears on it. I will overrule the objection in the light of Exhibit 21-B, and I will allow 21-A to go in.

The Clerk: 21-A and 21-B in evidence.

(The documents referred to, marked Plaintiff's Exhibits 21-A and 21-B, were received in evidence.)

By Mr. Somerville:

Q. What is your name, please?

A. Verlin G. Sheldon.

Q. Where do you live?

A. Portland, Oregon.

Q. Mr. Sheldon, have you ever operated a service station bearing the Richfield colors? Have you ever operated a service station handling Richfield gasoline?

A. Yes, sir.

Q. When did you first operate such a station?

A. Approximately in the spring, perhaps in March in '38.

Q. In '38?

A. '48. I beg your pardon.

Q. What was the location of that station?

[fol. 2348] A. 7510 North Lombard, Portland, Oregon.

Q. Mr. Sheldon, I am interested in knowing, did you have a lease concerning that station with Richfield?

Mr. Paradise: You mean a lease from Richfield?

By Mr. Somerville:

Q. A lease from Richfield to that station?

A. Yes, I did.

Q. I am interested in knowing how you obtained that lease. Would you tell us, did you seek out someone from Richfield, or did someone from Richfield seek you out with respect to executing that lease?

A. I wasn't so much interested in the lease until after I decided to purchase the station.

Mr. Paradise: We can't hear you. I am sorry.

The Witness: I wasn't so much interested in the lease until after I decided to purchase this particular station.

By Mr. Somerville:

Q. Did you make inquiry concerning the desirability of service station locations?

A. I did that.

Q. Did you determine that you wanted to lease this particular station?

A. Well, I had a very good friend who was a merchandiser for Shell Oil, and going at it in a business sense, I had this man on the lookout for me. I contacted some Texaco stations that were in the vicinity of my home, and with the thought in mind of their location and also the [fol. 2349] location of my home, and by dropping in on different stations from time to time and studying their business and their business methods, I finally decided that this one certain station could be made into a fine station. It was within walking distance from home, so I dropped in and asked the man one day if he ever had any thought of selling his station.

Q. You are talking about the man who was operating that particular station?

A. That's right.

Q. What was his name?

A. Andy Stover.

Q. Did you ask if he would sell it?

Mr. Paradise: I object to that, if the court please, as purely hearsay, unless it is tied up with this defendant.

Mr. Somerville: I think it has a bearing upon the issues in this case, counsel. The manner——

Mr. Paradise: It may have a bearing, but it is incompetent.

The Court: It must have a closer bearing than that. Let's get down to the transactions. I will sustain the objection.

Mr. Somerville: May it be stipulated, counsel, this is a service station lease between Richfield, as lessor, and V. G.

Sheldon, as lessee, on Form 542, print date 3-46, dated [fol. 2350] March 9, 1948, covering the premises at 7510 North Lombard Street, Portland, Oregon, specifying a flat minimum rental of $50 per month.

Mr. Paradise: So stipulated, except that it is not a flat minimum. It is a flat rental.

Mr. Somerville: A flat rental.

Mr. Paradise: It can't go higher.

The Court: All right.

By Mr. Somerville:

Q. How long did you operate this particular station, Mr. Sheldon?

A. About, until the middle of May '49; until the 1st of May in '49.

Mr. Paradise: We can't hear you.

The Witness: About the 1st of May in '49.

By Mr. Somerville:

Q. Did you subsequently enter into a lease on another service station with the Richfield Oil Corporation?

A. Yes, sir.

Q. What was the location of that station?

A. 7434 North Vancouver, Portland.

Q. Did you terminate your lease on the previous station?

A. I did that.

Mr. Somerville: May it be stipulated, counsel, that this is a lease between Richfield and V. G. Sheldon, on Form [fol. 2351] 542, print date 3-46, bearing date of March 9, 1948, covering the premises at 7434 North Vancouver, Portland, Oregon, and specifying——

Mr. Paradise: That is the lease you just discussed.

Mr. Somerville: I am sorry, counsel. A lease dated June 10, 1949, between Richfield, as lessor, and V. G. Sheldon, as lessee, on Form 542, print date 8-46, covering the premises at 7434 North Vancouver, Portland, Oregon, and specifying a minimum rental, or a monthly rental of $50 a month, plus one cent per gallon in excess of 5,000 gallons.

Mr. Paradise: So stipulated.

The Court: All right.

By Mr. Somerville:

Q. Mr. Sheldon, with respect to this station, are you still operating it?

A. I am.

Q. And at any time, sir, did you handle any competitive oil at this station?

A. At times.

Q. What oil was that? What brands of oil?

A. Mostly Pennzoil and Quaker State.

Q. Did you have any particular reason for handling that?

A. At the time I started the new station, there wasn't no competitive oils in there, and I found, in starting in in the summer months, that tourists would come out to the [fol. 2352] station island, and I would greet them in the regular manner, and before they would let me approach them, they would come at me with the question, "Do you have Pennzoil?" And I said, "No." The answer would be, "I need an oil change, but I must have a station that has Pennzoil," and he would drive on.

Q. So you began stocking some quantity of it?

A. That's right.

Q. Where did you keep that oil?

A. Well, I have no storage room anyway. I was keeping it in the cloakroom.

Q. Was there ever any incident in which a Richfield representative called your attention to the fact that you had that oil?

A. Yes, Gene Ranes did.

Q. When did that occur, sir?

A. Oh, about sometime in the summer of '50, I believe.

Q. What did Mr. Ranes say concerning that oil?

A. He told me that Mr. Lalande, another company man, had found it in there and requested him to see that I got rid of it.

Q. What did you then do with that oil?

A. I had a small tool box. I put part of it in there, and put the rest of it in my car.

Q. Mr. Sheldon, did you ever give instructions to any [fol. 2353] competitive oil man to make deliveries at your home?

A. I gave them instructions not to—that I would rather pick up the oil myself than have them deliver it.

Q. Did you give any similar instructions with respect to TBA products, competitive TBA products I am referring to.

A. That would be other than Richfield approved?

Q. Yes, sir.

A. Not that I remember.

Q. Would you tell the court, please, whether there was any Richfield representative that periodically called on your station?

A. Yes, sir; at least once a week.

Q. Would he inspect your stock?

A. That was part of his business, to check my stock, see that I had adequate grease and oil on hand, and that the maintenance was in order.

Q. Have you ever handled any competitive batteries?

A. At one time.

Q. What brand of batteries were they?

A. Nickelite.

Q. Was there any particular reason for your handling those batteries?

A. Two. One reason was that my adjustments were so very poor on Goodyear. One of them turned in to the company for an adjustment, and I got that adjustment back 90 [fol. 2354] days later, but the man,—I had installed a new battery on it in the 90 days' time and he had left for Minnesota, so that adjustment was on me, and my adjustments have all been very slow and hard to get, and with the competitive line of batteries I was allowed to make my own adjustments on the spot, and any time I called the supplier, he, in turn, reimbursed me within 24 hours.

[fol. 2355] Q. And what was the other reason for handling those batteries?

A. Not that one battery was any better than the other, but the other battery had a better sales approach.

Q. And that was the Nikolite battery?

A. That is right.

Q. Did you display these prominently in your station?

A. I did that one time, your Honor, yes, sir.

Q. Were you visited at any time by any Richfield representatives with respect to that station?

A. This happened in the early winter, I would presume in January of '50. It was through the gasoline shortage—no, it was not. But it was through the peak. We were practically out of business in January '50 for 30 days on account of snow. It was four or five feet deep. Mr. Ranes come in and told me that I would have to get my batteries out and dispose of them, that he had been notified from Seattle that they were there and I would have to dispose of them.

Q. What did you do about it?

A. They were selling pretty fast. I ended up with one to set back on the shelf until it went.

Q. And then you did not buy any more?

A. That is right.

By the Court:

Q. Do you still have customers that like Nikolite bat-
[fol. 2356] teries?

A. Occasionally.

The Court: What do you do?

The Witness: I pick them up, telephone the jobber and he brings them down within 15 minutes.

By Mr. Somerville:

Q. But you do not carry any in stock?

A. I do not stock them.

Q. Have you ever been interested, sir, in handling competitive tires?

A. I would be interested in handling any competitive merchandise where I could get a wider margin of profit.

Q. On any occasion have you inquired concerning competitive tires of the manufacturer or manufacturers' representative?

A. At one time—I couldn't tell you the date—I clipped a coupon out of a paper from an advertisement of Gates Rubber and sent that in direct to the company. I believe their home offices was Denver.

Q. And following that occurrence did you receive any visits from any representatives?

A. Yes, that I did. That seems to have been also sometime in the summer of '50, in the later summer, I would say in August. I believe it was after my vacation.

Q. Who was that? Was that a representative from the [fol. 2357] Gates Rubber Co.?

A. That was a representative directly from the Gates Rubber Co. I was unfortunate that day in having an amount of work to do, and when I have a customer he comes first. And after the man introduced himself I just left him stand.

Q. Did he make any attempt to make a sale of tires?

A. He was a gentleman, and seeing that I had more work than I could do, and after standing around probably half an hour, he came and told me, he said, "I see that you are too busy to talk with me. I can't wait any longer. I must be on my way," I believe to Spokane. "I will see you the next opportunity I get."

Q. Was there any Richfield representative present at the time?

A. Yes, Mr. Ranes was there.

Q. And did you observe whether Mr. Ranes and this gentleman from the Gates Rubber Co. were conversing?

A. They were. I was so busy I didn't have time to see what the conversation was about, but I did see them talking together.

Q. Did you subsequently learn through Mr. Ranes of any conversation with this gentleman that was there?

A. I presume I did, but I couldn't make an honest, true statement on that. It would be more of a case what was probably said. I couldn't make a definite statement.

[fol. 2358] Mr. Somerville: I think that will be all.

The Court: All right, cross-examine.

Cross-examination.

By Mr. DeMartini:

Q. Mr. Sheldon, you changed your location from the first station to the second station. I don't remember the locations. What was the reason for that?

A. The reason for that, I told the Richfield representa-

tive at that time, Armond Lalande, that I would buy out the station on Lombard for only one reason.

Q. Is that the second station?

A. That is the first station.

Q. What was the conversation?

A. That after I proved myself as a station operator, I wanted a decent station, or otherwise I was not interested in doing business with the company.

The Court: How long did you keep the first station?

The Witness: Less than a year, your Honor.

The Court: And then you changed?

The Witness: That is right.

By Mr. DeMartini:

Q. And they moved you to the second station, which was on the other side of——

The Witness: That is right.

The Court: In the same part of town?

The Witness: It was about four miles due east.

[fol. 2359] The Court: Across the river?

The Witness: No, just straight east up the peninsula.

The Court: All right.

By Mr. DeMartini:

Q. That move was made in order to get you a better advantage, a better service station, is that correct?

A. I had growing pains.

Mr. DeMartini: Thank you, sir.

The Court: All right.

By Mr. Somerville:

Q. Did you state, sir, that you were currently operating that same station.

A. I never operated both stations at the same time. Perhaps 30 days lapsed between the termination of one lease and the beginning of another.

The Court: What are you operating now?

The Witness: I am operating 7434 North Vancouver.

The Court: Step down. Let us have a short recess. Have

you gotten through with most of your out of state witnesses?

Mr. Dixon: I think we have two left, your Honor. We can finish.

The Court: That is all right. I was just wondering why you put on a Taft man.

Mr. Dixon: Oh, yes.

The Court: That is all right.

(Short recess.)

[fol. 2360] The Court: All right. Call your next witness.

Mr. Somerville: The government calls Mr. Ransom.

Gaylord Ransom, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?

The Witness: Gaylord Ransom.

The Clerk: The last name, the spelling?

The Witness: R-a-n-s-o-m.

By Mr. Somerville:

Q. Mr. Ransom, where do you reside?

A. Walla Walla, Washington.

Q. What business or occupation are you in?

A. I am with the Gates Rubber Company of Denver.

Q. How long have you been with the Gates Rubber Company?

A. Two and a half years.

Q. What positions have you held, chronologically?

A. To start with as a T. M. E. man, which is Tire Market Extension, for a year.

Q. What are the duties of that particular branch?

A. T. M. E. is to establish new dealers.

[fol. 2361] Q. Then what was your next position?

A. Well, I became district manager.

Q. As district manager, what were your duties, or are your duties?

A. Well, the duties are to service the accounts that have been established by the T. M. E.

Q. And that is your present position?

A. That's right.

Q. Now, in your position are you familiar with the products that are handled by the Gates Rubber Company?

A. Reasonably well.

Q. What products are manufactured by the Gates Rubber Company?

A. Well, we manufacture tires, and tubes, and floor mats, for automobiles, radiator hose, and our fan belt. We also handle a battery. We don't manufacture it, but it is sold under our trade name, as Gates.

Q. In your position as T. M. E. man or Tire Market Extension man,——

A. Yes.

Q. —did you contact service station outlets with respect to the sale of these products?

A. That's right, contacted outlets.

Q. What are your duties as district manager in that respect?

[fol. 2362] A. Well, now, these outlets that are established in my district, I service them, and also establish new outlets in favorable places, that is, desirable accounts, which I think would be desirable.

Q. What is the area under your particular jurisdiction?

A. Well, I have seven counties in Oregon along the Columbia River, from Seaside as far as the Dalles, which is in Sherman County. Then there are about 20 counties in Washington west of the Columbia River, with the exception of the area adjacent to Seattle, which is not in District 103.

Q. And in respect to Idaho?

A. I have nothing in Idaho.

The Court: Your account is——

The Witness: West of the Columbia River.

The Court: What is that?

The Witness: The counties west of the Columbia, sir.

The Court: But are they east of the mountains?

The Witness: On both sides of the Cascades.

The Court: How?

The Witness: On both sides of the Cascades.

The Court: On both sides of the Cascades?

The Witness: Yes, from Centralia south to the Oregon border on the west side of the Cascades.

By Mr. Somerville:

Q. Would you please tell the court where shipments on [fol. 2363] tires and fan belts are received in the states of Oregon and Washington?

A. Well, the Portland warehouse serves Oregon and Washington and part of California with our tires, tubes and batteries.

Now, the fan belts are handled in a different manner. They are handled by a jobber, and the jobber in the district I am in is George Lawrence of Portland.

Now, I am not familiar with the fan belt set-up, but I do know that he services most of the territory that I cover as a jobber for the fan belts, but we do not have any jobbers in the tire, tube and battery division. That is all handled direct from the warehouse.

Q. Now, with respect to tires and tubes and fan belts, as I understand it, those items are manufactured at Denver?

A. That's right.

Q. And they are shipped to the warehouse in Portland?

A. Well, the tires and tubes are shipped to the warehouse. Now, the fan belts would be shipped direct to the George Lawrence Company.

Q. And on the tires and tubes are they sometimes shipped directly to service station dealers?

A. They are in the event that the service station buys a truckload or a carload.

Q. What determines the warehouse inventory, antici- [fol. 2364] pated orders, or——

A. Well, anticipated needs for the area that it services.

Q. Do you know the frequency with which tires are being shipped into that warehouse?

A. Well, under normal conditions, we get several carloads a week, but now during this emergency, if we get one carload a week, we have done well.

Q. And how rapidly do they move from the warehouse?

A. Well, our warehouse inventory is nil at the present

time, that is, in Portland, and I presume it would be here in the city as well.

Q. And during a normal period?

A. During a normal period we keep it up to a necessary inventory to take care of our needs.

Q. That is a company warehouse, is it?

A. Oh, yes, a company warehouse.

Q. Are you familiar with the Goodyear tires, and batteries, and tubes?

A. Well, I often see them, if that is the answer.

Q. Are your products comparable in quality and size to those?

A. They are better in quality, sir.

Q. They have as good a guarantee?

A. Better.

Q. Well, you do know what the guarantee of Goodyear is? [Vol. 2365] A. Yes, I do.

Q. Now, with respect to service station accounts, do you recall ever having made any sales attempt, or an attempt to set up a distributor for Gates tires at a service station operated by Verlin G. Sheldon, on Vancouver and Lombard, in Portland, Oregon?

A. I do.

Q. Were you in the court room earlier this afternoon?

A. I was.

Q. Did you observe Mr. Sheldon on the stand?

A. I did.

Q. And was that the man who was operating the service station?

A. Yes.

Mr. Paradise: That is the same Mr. Sheldon who is operating an L-O station in Portland, Oregon?

Mr. Somerville: Yes, it is.

By Mr. Somerville:

Q. Now, with respect to this particular station, what occasioned your call at this particular station?

A. Well, it was approximately a year ago the Gates Rubber Company obtained a mailing list of all the prospective outlets for their products, and this was mailed out to them,

and Mr. Sheldon apparently had answered the questionnaire, or answered the card that was enclosed to have a representative call on him. I, in turn, was advised from [fol. 2366] Denver, of course, along with many others that had answered this mailing list that we sent out.

Q. And so in this letter that went out,—have you seen the letter?

A. Yes.

Q. Did that outline somewhat the Gates tire deal?

A. Well, very meagerly. It just asked the prospective dealer if he would be interested in a Gates representative calling, and there was a little sales promotion enclosed in the letter, but it was limited.

Q. Approximately when did you make this call on Mr. Sheldon?

A. Well, it could be a year ago today. It was in the middle of May.

Q. At the time that you made that call, did you approach Mr. Sheldon with some sales talk on tires?

A. Yes, I was able to speak to Mr. Sheldon, oh, in between jumps, you might say. He was busy. But I did start the sales presentation to him.

Q. Did you tell him that you were calling in response to his letter?

A. Oh, yes.

Q. Was there anyone else present at that time?

A. Yes, there was a Mr. Elliott with me, which is the [fol. 2367] manager of our largest dealer in Portland. I took Bob Elliott with me, thinking if we would set up this account, that it would be an associate of the firm of Elliott and Elliott. And there was also a representative of the Richfield Oil Company there.

Q. Did you complete your sales talk with Mr. Sheldon?

A. No.

Q. Did you have any conversations with this Richfield representative?

A. Yes. He saved me the trouble of finishing my presentation by announcing himself and his capacity with Richfield.

Q. What did he say?

A. Well, he says, "You boys are just wasting your time

here." He says, "I'm"—I think he said, "Ranes of Richfield Oil Company, and my job is to see that you fellows do not get your products into our outlets."

Q. And was Mr. Sheldon present during that conversation?

A. Yes, it was all in his service station.

Q. You don't know whether he was standing right by?

A. Oh, no, I wouldn't say that he was, but Mr. Elliott was with me.

Q. Did you make any further approach to Mr. Sheldon before you left?

[fol. 2368] A. Oh, yes. As I was going out, Mr. Sheldon in a low voice says, "Come back when he isn't around." And which I didn't do, although I suggested to Elliott that he call back.

Q. And the reason that you didn't call back was——

A. Well, it looked like a closed account, anyway.

Mr. Paradise: It what?

The Witness: It looked like a closed account, anyway, as far as we were concerned, one that we couldn't break into.

By Mr. Somerville:

Q. In view of the conversation with Mr. Ranes?

A. Yes, in view of the conversation with Mr. Ranes.

[fol. 2369] By Mr. Somerville:

Q. One thing I neglected to bring out on Gates batteries. Where are they manufactured?

A. They are manufactured in Salem, Oregon.

Q. Are they shipped to points in Washington and Oregon?

A. They are shipped to our warehouse and from there to the accounts.

Q. And from the warehouse they go to points in Oregon and Washington?

A. Yes, and wherever tires are sent.

Q. Does that include the State of Idaho?

A. Yes, Idaho and part of Montana and part of California.

Mr. Somerville: Thank you. I think that will be all.
The Court: Any cross-examination?

Cross-examination.

By Mr. Paradise:

Q. Mr. Ransom, the Gates Rubber Co. is rather a substantial company, is it not?
A. We are the sixth largest in the United States.
Q. As I understand it, that company has a net worth something in excess of $35,000,000.
A. Yes, very much in excess, I believe.
Q. How many sales outlets does the company have?
A. We have over 5,000 in the United States.
Q. Pardon me?
A. We have over 5,000 in the United States.
[fol. 2370] Q. I understood it was larger and that the figure was somewhere between ten to fifteen thousand accounts. Am I wrong?
A. I believe you are. I am speaking of the tire accounts now. We have other divisions such as industrial and the automotive, which I am not familiar with now.
Q. Do you as part of your sales operations call on the stations of Standard Stations, Inc.?
A. Oh, yes.
Q. To whom do you talk in those stations?
A. Talk to the manager.
Q. You understand when you go in there that the manager is a salaried employee of the Standard Oil Co.?
A. Not necessarily. I am not interested in his capacity.
Q. I did not ask you if you were interested. I was wondering if you knew.
A. No, I do not.
Q. You don't know. How long have you been in this business?
A. Two and one-half years.
Q. Pardon me?
A. Two and one-half years.
Q. Two and one-half years. Has it come to your attention, Mr. Ransom, that certain service stations on the Pacific Coast are owned by particular oil companies?

[fol. 2371] A. Yes, I have been made aware of that.

Q. Has it also come to your attention that certain service stations on the Pacific Coast are leased to certain oil companies?

A. Yes. Well, don't pin me down on that. I know the oil companies have their fingers on them. I don't know whether they are leased or owned or how they are controlled, but I do know the oil companies have their fingers on them. I like to put it that way.

Q. Has it come to your attention that the Richfield Oil Corporation, particularly, owns or leases particular service stations?

A. Yes, I know that they have their fingers on service stations, as well as others.

Q. You know also, do you not, that the Richfield Oil Corporation during the period in which you have been sales manager for this company has constructed service stations itself?

A. I don't know that they built or not.

Q. That is not within your knowledge?

A. No.

Q. When you go into a service station do you inquire of the service station attendant whether the oil company whose particular products are being sold in that station owns that station?

[fol. 2372] A. I at times will inquire if this is a controlled outlet.

Q. And when you are so informed, it is true, is it not, that you no longer consider that as a customer?

A. Well, we have gotten in where they were controlled.

Q. Sneaked in through the back door?

A. No, went right in the front.

Q. This conversation that you said you had with Mr. Ranes, he stated you were wasting your time there?

A. That is right. That is his words.

Q. You understood by that, that he meant that Richfield Oil Corporation either owned or leased that station?

A. Well, I took it that if Mr. Sheldon did take our tires it would cause him trouble.

Q. Pardon me?

A. I took it that if Mr. Sheldon did take our tires it would

cause him some trouble, if we were successful in selling tires to him.

Q. I do not think you answered my question, Mr. Ransom. Would you read it, Mr. Bargion?

(Question read by the reporter.)

A. Yes, that would have something to do with it. That would be their station.

Q. You understood that from what Mr. Ranes told you?

A. Yes.

[fol. 2373] Q. Did you not understand that you actually were wasting your time there?

A. Well, after the man told me so, I did, yes.

Q. And yet you nevertheless told Mr. Elliott to drop back there, anyway, even though you had knowledge that if he went back there it might be getting Mr.—what was his name—Sheldon in trouble.

No further questions.

The Court: Well, did you answer it?

The Witness: Pardon?

The Court: What was your answer?

The Witness: Yes. You mean the last question the gentleman asked me?

The Court: Yes.

The Witness: Yes, I suggested Mr. Elliott to go back and if he could sell him, all right.

The Court: I did not hear your answer.

Redirect examination.

By Mr. Somerville:

Q. What did you mean, Mr. Ransom, in your answer to Mr. Paradise's question, the company has their finger on the station?

Mr. Paradise: Oh, I think that is argumentative.

The Court: Well, go ahead.

A. I just meant that the company more or less controlled the station or owned or leased it or had something to do with [fol. 2374] it.

The Court: In some fashion?

The Witness: In some manner.

The Court: You were not interested in the relationship that existed between them?

The Witness: No, that is absolutely right.

The Court: But you had no particular desire to get the dealer in trouble?

The Witness: No, no. I was only promoting our stock.

The Court: In other words, the mere fact that the person said "no" did not prevent you from informing your man he might try, and where he might be in error sometimes, even if he bought one tire, isn't that your idea?

The Witness: That is right.

The Court: You were still promoting the—what did you call it?

The Witness: TME.

The Court: TME. Talk about alphabetical agencies, I see now the oil companies have gotten more limitations, even for marking deportment on their station agents.

In other words, you did not take the statement as final and just called in the hope that he might change his mind. If he said again, "no," why, there was no harm done, is that it?

The Witness: That is right. We even went back repeatedly after repeated no's.

[fol. 2375] The Court: I see. All right.

Mr. Somerville: Just one or two questions.

The Court: I didn't want any answer to stand without explanation. It was a pretty broad question. I didn't know whether you wanted it to stand that you deliberately seek to get a man in trouble, you know, by soliciting.

The Witness: Well, no.

The Court: So long as he did not buy, he would not get in trouble anyway.

By Mr. Somerville:

Q. Mr. Ransom, does the Gates Rubber Co. have any particular policy with respect to requiring your dealers to display products that are sold to them?

A. Well, we are hesitant to set up any account that won't put up our advertising and let the public know that they have our products.

The Court: But you would not decline to sell?

The Witness: Well, no, we wouldn't. But we are hesitant about setting up any dealer.

The Court: A regular account?

The Witness: Yes.

The Court: Regardless, if any man, no matter what station he is running, would call you up and say, "Look, I have a customer who wants one of your products," you would not tell him no?

The Witness: We would put it out through one of our dealers like this Froman dealer there, with Mr. Elliott. [fol. 2376] That would be through his account.

The Court: You would put it through him?

The Witness: Yes.

By Mr. Somerville:

Q. With respect to the outlet you were describing as owned by the company or leased, were you generally successful in selling them?

A. No, not generally.

Mr. Paradise: Now, wait a minute. You are asking for what type of account?

Mr. Somerville: Those that were referred to by you as leased or owned.

The Court: Well, he said no. It is a pretty broad question. He answered it just as broadly. All right.

By Mr. Somerville:

Q. You regard the Richfield stations as closed accounts?

A. Well, they are closed——

Mr. Paradise: Now, wait a minute. I object to the question.

The Court: That calls for a conclusion.

Mr. Paradise: Because there are two kinds of stations.

The Court: I was trying to bring it out by facts, not generalities. Let me decide whether it was a shut-out or a lock-out.

Mr. Somerville: I appreciate that, your Honor.

The Court: That is why I wanted to avoid the implication of the last question and get more details to see what [fol. 2377] he did when a man said "no" to him.

Mr. Somerville: I think he has developed that now. That is all.

The Court: All right, that is sufficient on that. We will put a period right there and stop it. All right. Step down. Call your next witness.

Mr. Somerville: The Government calls Mr. Ogburn.

The Court: Is he your last witness from out of the state?

Mr. Somerville: The last witness.

The Court: All right, let us hear him.

Frank Ogburn, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Frank Ogburn.

Direct examination.

By Mr. Somerville:

Q. What is your name, sir?
A. Frank Ogburn.
Q. Will you speak a little louder?
A. Frank Ogburn.
Q. Where do you live?
A. Portland, Oregon.
[fol. 2378] Q. What is your present business?
A. Landscape contractor.
Q. Have you ever operated a service station bearing the Richfield colors?
A. Yes, sir.
Q. And during what period of time?
A. March 1949 to March 1950.
Q. And where was that service station located?
A. Reedville, Oregon.

The Court: That is a town I never heard of. Where is that?

The Witness: That is between Beaverton and Hillsboro on the Tillamook Highway.

The Court: Oh, yes.

Mr. Somerville: The Government asks the following documents be marked for identification: 3-C operator's lease dated June 18, 1946 between Richfield Oil Corporation, lessor, and Raymond R. Mathis, lessee, covering the certain premises in Reedville, Oregon; a 3-C operator's sales contract dated June 18, 1946 between Richfield Oil Corporation, as seller, and Raymond R. Mathis, as buyer.

Counsel, there were no 3-C service station leases included with this group of documents. We have in our possession a 3-C service station lease that we have picked up from a source other than yourselves. May it be stipulated that this [fol. 2379] is a photostat of an actual 3-C service station lease?

Mr. Paradise: I have no objection to the photostat being used in lieu of the original, if that is what you mean.

Mr. Somerville: And a document, 3-C service station lease, dated June 18, 1946 between Raymond R. Mathis and Winifred I. Mathis, lessor, and Richfield Oil Corporation, lessee.

The Clerk: Will you hand me the document which is 22? Just a moment. Government's Exhibit 22 marked for identification is 3-C operator's lease. Government's Exhibit 22-A is the 3-C operator's sales contract, also marked for identification. The photostat of the 3-C service station lease is Government's Exhibit 22-B for identification. Do you have others here to be marked? Government's Exhibits 22-C, 22-D, 22-E and 22-F marked for identification.

(The documents referred to were marked Plaintiff's Exhibits 22, 22-A to -F, inclusive, marked for identification.)

Mr. Somerville: The Government asks that they be received into evidence. Is there any objection?

The Clerk: Are these admitted, your Honor?

The Court: They may be received.

(The documents referred to were marked Plaintiff's Exhibits 22, 22-A to -F, inclusive, and received in evidence.)

By Mr. Somerville:

Q. Mr. Ogburn, do you have or did you have any arrangements during this period that you were operating this serv-[fol. 2380] ice station with Mr. Raymond R. Mathis?

Mr. Paradise: Objected to as immaterial.

The Court: I can't tell what it is going to lead to. It is a preliminary question. Overruled.

A. You mean prior to the time I took the station over?

Q. Well, during the period that you operated the station what was the basis of your operation of the station? Did you have any arrangements with Richfield Oil Corporation?

A. No.

Q. Any contract?

A. I contracted with Mr. Mathis.

Q. Did you have an oral contract or a written contract?

A. At first it was oral and then it was written.

Q. When was this contract made?

A. Well, a month or two after I took the station over.

Mr. Paradise: Oh, I object to any——

Mr. Somerville: Counsel, these are preliminary questions. Richfield will be tied in here in a moment.

The Court: We are not going into details, just the beginning of the negotiations until it got to Richfield. Go ahead.

By Mr. Somerville:

Q. With respect to this arrangement were there any Richfield representatives present?

A. In the starting, yes, Mr. Schwab, when I first——

Q. Who was Mr. Schwab?

A. He was a district or a bulk operator or distributor [fol. 2381] of Hillsboro, Oregon.

Q. And where did these discussions concerning this arrangement occur?

A. Well, in my house and Mr. Mathis' house.

Q. Were you to operate the station for Mr. Mathis?

A. No, for myself.

Mr. Paradise: Now, I will object to this type of examination. He is calling for conclusions, of course. If there is any materiality to these conversations——

The Court: Yes, I will sustain the objection. He can tell. If that conversation is material, he can tell us.

By Mr. Somerville:

Q. What was said concerning the transaction?

The Court: What was said?

A. Mr. Mathis asked me to take the station over, as they were closing out the operator ahead of me. At that time Mr. Schwab, Mr. Mathis and I talked it over and conditions of operating the station were taken up at that time.

By Mr. Somerville:

Q. And what were those conditions?

A. Mr. Schwab at that time said that it was a policy to always—of Richfield Oil Corporation not to have other brand oil in the stations, and that part of the argument of the prior operator was because of the refusal to take the oil from the floor in the station to somewhere else or take it out. At that time Mr. Mathis and I agreed that we would take the oils, Pennzoil, Quaker State, and other oils out of [fol. 2382] the main station and into the lube room. Mr. Mathis—because I myself said that I desired to keep the off-brand oils, because it was a community station and was needed. He and I agreed to put it in a cupboard, which we prepared with doors on it, and there I kept it.

Q. Did Mr. Schwab say anything about Richfield's wanting or not wanting that oil?

A. Only the statement that it was policy not to have the operators carry it, if possible.

Q. Did you pay any rental for the premises?

A. I paid one cent a gallon to Mr. Mathis.

Q. And did you buy out the stock of the preceding operator at that station?

Mr. Paradise: Now, if the court please, I think there is enough testimony by Mr. Ogburn to show that this testimony is completely irrelevant and should all be stricken. There is no contract—pardon me.

The Court: Go ahead. I want to hear the last question preceding it. Read the last question.

Mr. Paradise: Oh, I am sorry.

(Question read by the reporter.)

The Court: Overruled.

Mr. Paradise: The basis of my objection, your Honor, was this: This man testified he has an arrangement with Mr. Mathis. He has no contract, oral or written, with Rich-
[fol. 2383] field Oil Corporation.

The Court: We will see. If it does not lead up to something with Richfield. So far we know that Richfield's representative was present and made some observation about their policy, and they reached some agreement on the policy. If that is all, I will probably strike it. Let us see where this leads.

Mr. Paradise: All right.

The Court: Go ahead.

The Witness: The last question was what?

The Court: The last question was answered, wasn't it?

The Reporter: No, your Honor, it was not.

The Court: Read it, please, Mr. Bargion.

(Pending question read.)

A. Yes.

By Mr. Somerville:

Q. Mr. Ogburn, did you produce in response to a subpoena any documents concerning the operation of the station?

A. Yes, I have a paper here on their inspection of my station from a Richfield man who comes around and inspects your station. At the present time it is all clear excepting an unauthorized sign.

Mr. Somerville: Will you mark this for identification?

Mr. Clerk: 22-G marked for identification.

[fol. 2384] The Court: All right.

By Mr. Somerville:

Q. Mr. Ogburn, did you buy gasoline and oil from Richfield Oil Corporation?

A. I paid for it directly to them, yes.

(The document referred to was marked Plaintiff's Exhibit 22-G for identification.)

Q. Did you buy——
A. Under the name of Mr. Mathis.
Q. And did you buy TBA products?
A. Yes, yes.
Q. From whom did you buy them?
A. Mr. Schwab.
Q. The Richfield commission bulk plant agent?
A. Right.
The Court: Other than this unauthorized sign, you had the Richfield colors and Richfield products?
The Witness: Right.

By Mr. Somerville:

Q. With respect to this document you have produced, which is "survey of service station operations" dated June 14, 1949 covering the premises at Reedville, Oregon, who is the person that signed this as Richfield representative?
A. That was the man that inspected the station.
Q. R. R. Froman?
A. Yes.
[fol. 2385] Q. Do you know what his capacity with the company was?
A. No, sir, I do not.
Q. And that is your acknowledgement there, "Frank H. Ogburn"?
A. That is right.

Mr. Somerville: We offer this in evidence.
The Court: It may be received.
The Clerk: 22-G in evidence.

(The document referred to was marked Plaintiff's Exhibit 22-G and received in evidence.)

By Mr. Somerville:

Q. Did you receive any other survey sheets from Mr. Froman or any other Richfield representative?
A. Yes. Mr. Froman, I believe, was just either advanced or his territory moved and another man came in. I got those, I believe it was about every three months they came around.

Q. Was the matter of unauthorized stocks the subject of discussions between you and Mr. Schwab and Mr. Mathis?

A. No, there was never any real discussion on it. As I recollect, there was never anyone ever asked me to take it down.

Q. Only the discussion concerning the products?

A. That is right. Well, I should say Mr. Froman said that if I had the sign down, I would have a clear record. [fol. 2386] Mr. Paradise: Who said?

The Witness: This Mr. Froman.

Mr. Somerville: Mr. Froman.

The Witness: Froman, or what is the name of the representative that ins-ected it? Froman I guess it is.

By Mr. Somerville:

Q. What was that sign, sir?

A. Pennzoil.

Q. And did you keep your competitive oil concealed?

A. Yes. As I stated, I had that behind cupboard doors in the lube room.

Q. What about TBA products, did you handle any competitive TBA products?

A. Yes. As it is stated, I bought some other products from what we call the pie wagon when he came by. I was not able to buy from Mr. Schwab because of delayed deliveries. I would take from the pie wagon and I would buy Fram filters and other items that I would need that Mr. Schwab did not handle.

Q. Where did you keep your authorized tires and batteries?

A. The majority of them, I kept them under a cupboard or at my house in the basement.

Q. I am talking about the authorized TBA products.

A. Oh, authorized. I kept them on the shelves in plain sight in my display. That is authorized.

[fol. 2387] Q. Did you keep your competitive tires and batteries on open display?

A. No. I never put a competitive battery in the window,

and most always I kept the stock, all except one tire in the rack, and the other at the home.

Q. What was your reason for putting those back?

A. The main reason was because of the attitude of Mr. Schwab towards my handling competitive merchandise.

Q. Did you ever buy any products from Christensen Oil Co.?

A. Yes.

Q. And did you ever leave any instructions with the salesman concerning the delivery of such products?

A. Yes. After I was there quite a while, Mr. Schwab's attitude seemed to be getting more and more desireful to my having that on the display, and instead of having them delivered to the station I had them delivered to my house.

Q. Did this attitude persist during the whole period from March 1949 to March 1950 that you were in the station?

A. It grew tremendously over that period.

Mr. Paradise: We should have facts. That is purely a conclusion of the witness.

The Court: No, no. He can tell whether it grew. Go ahead.

By Mr. Somerville:

Q. You started to go into the matter of the inventory [fol. 2388] that you had when you took over the station. Where did you get the inventory that you originally started with?

A. I bought it from the outgoing operator.

Q. And who was that?

A. Mr. Saucerman with a hookup there and Mr. Wilson, I believe, held the contract with Mr. Mathis, but in the process, Mr. Saucerman and Mr. Wilson worked it together.

Q. Did Mr. Saucerman have authorized products?

A. Authorized, yes.

Q. What were they, a full line?

A. What?

Q. A full line of authorized products?

A. Well, no, I wouldn't say it was a full line, but all he needed, all he felt he wanted.

Q. And did he have any competitive items?

A. Yes.

Q. Do you remember any of those?

A. Wel-, there were batteries and tires and Fram filters and oils, your Pennzoil, your Quaker State, Armstrong tire, A-C battery.

Q. Did you have any discussion with any Richfield representative concerning whether or not you had to purchase these items?

A. No.

[fol. 2389] Q. Did you have any discussions with anyone?

A. The only discussion that was ever brought in through the transaction of my taking over the station and receiving the inventory was that Mr. Mathis, and, I believe Mr. Schwab, also made the statement, that I didn't have to take anything except authorized Richfield products and TBA.

[fol. 2390] Q. What was your inventory? What was the approximate value of it?

A. I believe it finally wound up to be about $1600.

Q. Now, at the time you left the service station, did you sell your stock to someone else,—the succeeding operator?

A. I sold only the authorized gasoline and TBA, because he made the statement to me, after we had already taken the inventory, that he didn't have to take anything except authorized products.

The Court: What did you do with the unauthorized products? Move them away?

The Witness: Took them home.

The Court: What?

The Witness: I took them with me, and then I have used them myself, and I still have some of it.

The Court: Are you operating a station now?

The Witness: No, sir.

By Mr. Somerville:

Q. What sort of unauthorized products did you have at that time?

A. Tires and batteries, and the oil, and Fram filters.

Q. Were you able to sell the authorized products to Mr.—who was your successor?

A. Sears.

Q. Were you able to sell the authorized products to [fol. 2391] him?

A. The authorized, yes.

Q. And were you able to sell the unauthorized products?

A. I returned some of them to one of the men that handled the pie-wagon, with a 10 per cent discount, and I took the balance home, and I used them myself, and sold some to my friends, and still have some.

Q. What was the price at which you sold the authorized products to the new operator or the new dealer, with relationship to the price that you paid for them?

A. I sold them to him for around 1200, and myself I said sixteen. I bought them at sixteen, and I sold him what he took, and he made me a check for twelve.

The Court: $1200?

The Witness: $1200, yes.

By Mr. Somerville:

Q. On the authorized products?

A. On the authorized products.

The Court: What was the value of the other products, the other merchandise?

The Witness: Around $350.

The Court: You didn't have very much?

The Witness: Not very much, no.

By Mr. Somerville:

Q. Did you offer the competitive products to Mr. Sears at a discount?

A. Yes, I offered it to him, everything, at what I paid [fol. 2392] for it, and if anything was cheaper at the time, I would give it to him at the lowest price.

Q. Did you offer any of those competitive products at less than the prevailing price?

A. Yes.

Q. And did he take them?

A. No.

Mr. Somerville: I think that is all.

The Court: All right. How about the exhibits? Are they in?

Mr. Dixon: Yes, they are in, your Honor.

The Court: They are marked for identification?

Mr. Somerville: We offered them, your Honor.

The Court: All right.

Mr. Paradise: I object to their introduction. Have these been introduced?

The Court: They are already in.

Cross-examination.

By Mr. Paradise:

Q. Mr. Ogburn, have you ever made any written contract with the Richfield Oil Corporation?

A. No, sir.

Q. Have you ever made any oral agreement with the Richfield Oil Corporation?

[fol. 2393] A. No, sir.

Mr. Paradise: If the court please, I move that all of this witness' testimony be stricken, and, also, that the exhibit—well, I don't care about this exhibit with Mr. Mathis, that the Richfield Oil Company has a contract with Mr. Mathis.

We have already discussed, I think sometime last week, the question of the defendant's sales to the service station dealers which are not made pursuant to any contract, oral or written, and it was held that that matter was purely immaterial and not responsive to any issue.

The Court: But this is merely a station as to which the contract is with someone else. This man executes the contract and then, by virtue of an agreement entered into with the consent of Richfield, he is executing the contract. Richfield was present at the birth of this contract, and so it is merely illustrative of a different kind of deal, whereby the conditions are passed on to the operator, even though the operator is not tied by any contractual relation to Richfield. So it is not in line with the others. They are not go-

ing to open up the line I have excluded,—what did you call them? We gave them a name.

Mr. Dixon: The uncontracted stations.

The Court: —of the uncontracted stations. I am not going to allow them to open that up. When I make a ruling [fol. 2394] of that character, I am not likely to change my mind about it. But this is a station where the operator acts through an agent, and the company knows about it, and arranges for the agency at the very beginning, and he deals in the name of the agent. He does as he is told, and is marked up, and they know all the time that he is executing the contract for the agent.

By Mr. Paradise:

Q. Did you have any written contract with Mr. Mathis?

A. Yes, sir.

Q. Did you bring it with you?

A. No, sir.

Q. Weren't you asked to?

A. Yes, but I couldn't find it.

Q. When did you make it?

A. When did I make it?

Q. Yes.

A. It was a short period after; if I remember, in one or two months.

Q. What date would that be, approximately?

A. In '49, and it would be around in April or May. I went in in March, '49, and it was after that.

Q. In what manner did you purchase gasoline?

A. In what manner did I purchase?

Q. Yes. Is it not true that all purchases of gasoline [fol. 2395] and other petroleum products by you from Richfield were done in the name of Mr. Mathis?

The Court: He said so. Isn't that true?

The Witness: Yes.

The Court: That is what you have already testified?

The Witness: Yes.

The Court: Yes.

By Mr. Paradise:

Q. Do you know, Mr. Ogburn, whether or not Mr. Mathis requested Mr. Schwab to come to this station periodically with this form 205 and show this to you?

A. I understand that is a general procedure of the Richfield Oil Company.

Mr. Paradise: I think that that answer should be stricken.

The Court: No, that is all right. Could you be more specific? Do you know it was at his request, at Mr. Mathis' request?

The Witness: No, not at Mr. Mathis' request.

By Mr. Paradise:

Q. You don't know that Mr. Mathis requested Mr. Schwab to do this?

A. No.

The Court: He said, "No."

By Mr. Paradise:

Q. Mr. Ogburn, as nearly as you can recall, what were the terms of your contract with Mr. Mathis?

A. As closely as I can recall, they were made to follow [fol. 2396] the lines of his contract.

The Court: But you never saw his contract? Did he show you his contract?

The Witness: Yes, he did.

The Court: At the time when this other man from Richfield was present?

The Witness: At the time he was making his and my contract out.

By Mr. Paradise:

Q. This is a written contract you are talking about now?

A. That's right.

Q. Between you and Mr. Mathis?

A. That's right.

Q. Will you make an effort to find that contract and send it to us?

A. Can I?

Q. I say, will you?

A. Yes.

The Court: Do you think you can find it?

The Witness: Well, my wife and I both looked for it when I left, but we never found it, but I will look again.

The Court: It will be understood that if it comes in, no other identification than what appears on the face of it will be needed, and it may be offered by the defendant, if they want to.

[fol. 2397] By Mr. Paradise:

Q. It is your understanding that your obligation under that contract was to perform that contract to the same extent as Mr. Mathis was required to perform his written contract, between him and the Richfield Oil Corporation, which he showed you?

A. Yes.

Q. Is that correct? Do I correctly understand that?

A. There is one statement there, that in ours—yes, I believe it did.

The Court: All right.

Mr. Paradise: That is all.

The Court: Any redirect? You have to have the last word of the day and the week. Now, make it brief.

Redirect examination.

By Mr. Somerville:

Q. Did you say was the written contract any different, to your knowledge,—any different than the oral arrangements that were made prior to the written contract?

A. Yes, as I started to hesitate a minute before, we agreed on putting the oil in the cupboards.

The Court: He has already explained that. Nothing was said about that?

The Witness: No, that I could never have it.

By Mr. Somerville:

Q. Just one matter of clarification: There was a Mr. [fols. 2398-2401] Froman that made those surveys in your station?

A. There was another man, too, but I can't remember.

Mr. Somerville: That is all.
The Court: All right.
Mr. Dixon: Tuesday morning, Judge, is that it?
The Court: You may be excused.
The Witness: Thank you very much.

(Witness excused.)

The Court: The case will be continued until Tuesday morning, and, of course, we will adjourn until Monday morning.

(Whereupon at 5:18 o'clock p. m., Friday, May 18, 1951 an adjournment was taken until Tuesday, May 22, 1951, at 10:00 o'clock a. m.)

[fol. 2402] Tuesday, May 22, 1951. 10:00 A. M.

The Court: All right, gentlemen, cause on trial.
Mr. Alexander: The government calls as its next witness Mr. Robinson.

Albert Robinson, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

The Clerk: What is your name, please?
The Witness: Albert Robinson.
The Clerk: R-o-b-i-n-s-o-n?
The Witness: Yes, sir.

By Mr. Alexander:

Q. Where do you live, Mr. Robinson?
A. I live in Phoenix, Arizona.
Q. What is the nature of your business?

A. Service station operator.

Q. Do you occupy a service station at 239 West Jefferson, under a written form of lease from the Richfield Oil Corporation?

A. Yes, sir, I do.

Mr. Alexander: Will counsel stipulate that this witness [fol. 2403] occupies a service station in Phoenix under a Form 542 lease, print date 11-44, executed the 30th of January, 1945, commencing January 27, 1945, and a second Form 542, executed the 31st of October, 1947, commencing November 1, 1947, covering the same premises.

Mr. DeMartini: So stipulated.

By Mr. Alexander:

Q. Mr. Robinson, when you took possession of this service station, what was the amount of the investment that you made?

A. Oh, around eight, nine hundred dollars.

Q. Will you describe to the court what was the nature of the merchandise that you purchased for this eight or nine hundred dollars?

A. It was mostly batteries. There wasn't very much accessories; a little oil and some gasoline. There was about 100 batteries in stock.

Mr. Paradise: We can't hear you, Mr. Robinson.

The Witness: It was mostly batteries, and very little gasoline, and very little oil, and a few accessories, but the extent of it was batteries.

By Mr. Alexander:

Q. Mr. Robinson, have you ever had any discussions with any of the Richfield representatives concerning the petroleum products that shall be handled by you at this station?

A. No.

[fol. 2404] Q. Calling your attention to about July of 1946, did you have any discussion with a Richfield representative in connection with the handling of petroleum products for the Gates Tire Company account?

A. Yes.

Q. Will you relate to the court the circumstances under which these conversations were held?

A. We were servicing the Gates Tire test fleet, and they were using Signal oil, and they would bring the oil up to our service station, and leave it in the back room there, Signal, and Mr. Gallaher came in and saw this Signal oil in the back room.

Q. Who is Mr. Gallaher, Mr. Robinson?

A. He is the city manager.

Q. Richfield's city manager?

A. Richfield, yes. He came in and he said, "What's that oil doing in there? Get that out of there."

I said, "It don't belong to me. It belongs to the Gates Tire test fleet."

That was the extent of that.

[fol. 2405] Q. Have you had any further discussions with Richfield representatives in connection with handling competitive petroleum products?

A. Yes. Later on, on the Armour account, they had their own. When I got the account they had their own oil. We sold the——

Q. Excuse me. About when did this take place?

A. Oh, I think it was in early '50. We got them on the gasoline account but not on the oil account. They had their own oil and they paid us so much a quart for servicing it. And we had their oil. Like on a week-end they would send up maybe 15 or 20 gallons of oil to work on the trucks and cars, and we had it in the back room like we did the Gates. And Mr. Gallaher came in, he made a survey of the station and he saw the oil in the back room. And he said, "What's that oil doing in here?" I said, "Mr. Gallaher, that is the oil for the Armour account. You knew that when we took it." He said, "Oh, I forgot about it."

Q. Nothing further was said, in connection with that oil?

A. No.

Q. Mr. Robinson, do you sell automotive accessories at your service station?

A. Yes, sir.

Q. From whom do you obtain these automotive accessories?

[fol. 2406] A. From the TBA man, Jack Dunbar.

Q. Have you had any conversations or discussions with any Richfield representatives in connection with the type or amount of TBA that you should handle at your station?

A. Oh, they had a——

Mr. Paradise: I can't hear you, Mr. Robinson.

A. They have a quota sheet and you are supposed to——

Mr. Paradise: Now, I object to that.

Mr. Alexander: I asked you have you had any conversations.

A. Oh, conversations.

Q. Have you had any conversations in connection with this matter?

A. On TBA?

Q. Yes, sir.

A. Yes.

Q. You have?

A. Yes, we have.

Q. With whom have you had those conversations and when?

A. I had a conversation with Mr. Gallaher about—it was not on the sale of the items or the purchase of them. It was on the display of them, to take out all unapproved products out of the display window and display canned oil, which we did.

Q. When would this have taken place, approximately?

[fol. 2407] A. '47, I think.

Q. 1947?

A. 1947.

Q. Have there been any subsequent discussions in 1947 in connection with this handling of TBA products at your station?

A. Yes, with Mr. Lempesis.

Q. Who is Mr. Lempesis?

A. I think he is a district merchandiser.

Q. For Richfield?

A. Richfield, yes.

Q. What was the nature of the conversation you had with Mr. Lempesis?

A. That we display Casite racks outside the service sta-

tion, and he came down and told us to take that Casite and put it in the back room because it was not an approved product. And also we had some car polish and a few other small items on the shelf in front, and we had to take it and put it in the back room, chrome bright and some of that stuff.

Q. Were you able to dispose of these products, having them in the back room?

A. Well, later on Casite became an approved product and we brought it out of the back room and put it up in front and disposed of it. The other stuff is still setting [fol. 2408] there.

Mr. Paradise: Mr. Robinson, you let your voice drop and we can't hear the tail end of your sentences.

The Court: I think if you will lean back.

A. Later on Casite became an approved product over there and we brought it out of the back room and displayed it and sold it.

The Court: You brought it out into the parlor, as it were?

The Witness: Yes.

By Mr. Alexander:

Q. Mr. Robinson, have you ever had any discussions in connection with the handling of fan belts at your service station?

A. Yes. At the time when I was looking around for some fan belts, Goodyear fan belts from our TBA distributor wasn't available.

Q. About when was this, Mr. Robinson?

A. Oh, I think it was in '46. And I purchased quite a few brand belts from Automotive Sales, and Greyrock belts, and they had an orange colored sleeve on them. And we had them displayed all across the front inside. And Mr. Gallaher said: "Why are you buying those Gates belts?" I said, "They are not Gates belts. They are Greyrock." So he said, "I am going to call Dunbar and have him come down and put Goodyear sleeves on them," and which they did.

[fol. 2409] Q. Have you had any discussion with any Rich-

field representatives in connection with the handling of competitive batteries?

A. Yes, with Mr. Gallaher during the war when batteries were hard to get and we were buying any kind of a battery we could get hold of to supply our customers to take care of our trade. And we had on display Hobbs and Willard, and Mr. Gallaher came in and those batteries were on the display rack. And he asked me why I was handling off-brand batteries, why wasn't we handling Goodyear batteries. I explained to him they wasn't available. So he said, "Get on the ball and sell them Goodyear batteries because we make a percentage on every sale of Goodyear batteries." But it wasn't possible at that time. They didn't have them.

[fol. 2410] Q. Mr. Robinson, do you have employees at your service station?

A. I have two, two employees, my wife and my son.

Q. And these people receive their salary from you?

A. Yes, sir.

Mr. Alexander: No further question.

The Court: All right.

Cross-examination.

By Mr. DeMartini:

Q. What had you done prior to leasing this station from Richfield:

A. The Richfield station—I had a G.P. station down in Phoenix.

Q. Now, when you were installed in this station, to whom did you talk with Richfield?

A. Mr. Gallaher.

Q. Did Mr. Gallaher explain anything with reference to your maintenance of the station, and the fact that you were to handle Richfield products, and keep it open as we directed, and so forth?

A. Yes, sir.

Q. Those things were all told to you?

A. Yes.

Q. Now, you have testified that with respect to several [fol. 2411] instances the company complained of your han-

dling competitive TBA merchandise. I understand that in many of those instances you were told to get it out of sight; is that correct?

A. Yes, sir.

Q. And not to display it?

A. That's right.

Q. But you continued to sell it?

A. Yes.

Q. Although you kept it hidden; is that correct?

A. That's right.

Q. Do you recall an instance in which Mr. Shepard, who I believe was a merchandiser, and you called on Armour & Company in an attempt to endeavor to have them change to Richfield lubricating oils?

A. Yes, sir, I do.

Q. Will you describe that incident?

A. Well, they were at that time, when Mr. Shepard and I made that call, handling—they had Standard Oil, RPM oil, and we were down there and talked to the maintenance man down there and tried to sell them on our oil, but the price was so great in difference we couldn't do anything about it.

Q. So you didn't succeed in getting the account?

A. No. We had the account.

Q. You had the account?

[fol. 2412] A. We had the account on gas and washing, but not on oil.

Q. You were able to hold the account on gasoline?

A. Yes, sir.

Q. It is true that at various times merchandisers called upon you, and you executed the form which is referred to as "Survey of Service Station Operations"?

A. Yes, sir.

Q. I will show you the form, in case you are not familiar with it (handing document to witness).

A. Oh, yes.

Q. Will you tell me what was the occasion of executing these forms, Mr. Robinson?

A. Well, there were certain opening hours and closing hours. There was taking care of the restrooms, and the drive, and police them and clean them up, and posting approved signs, gas signs, and oil signs.

Q. And they would call periodically; is that correct?
A. That's right.
Q. I call your attention to the occasion of gasoline wars. You know what that term means, don't you?
A. Yes.
Q. I believe one occurred in the Phoenix area in and about February of 1950, and also in and about November of 1950; is that correct?
[fol. 2413] A. I think it is.
Q. Yes. It is true that the company, that is, the Richfield Oil Corporation allowed you additional discounts in order to meet depressed prices; isn't that correct?
A. That's right.

Mr. DeMartini: That is all.
The Court: Any further questions?
Mr. Alexander: No further questions.
The Court: Step down, Mr. Robinson.

(Witness excused.)

The Court: Call your next witness.

Dominic Delucchi, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?
The Witness: Dominic Delucchi.
The Clerk: Dominic, and how do you spell the last name?
The Witness: D-e-l-u-c-c-h-i.

By Mr. Greer:

Q. You pronounce that Delucchi?
A. That's right.
Q. Where do you live?
[fol. 2414] A. 838 Green Street, in San Francisco.

Mr. Paradise: Will you speak up, Mr. Delucchi, please?
The Witness: 838 Green Street in San Francisco.

By Mr. Greer:

Q. Where are you employed, sir?

A. I am employed with the Pacific Gas & Electric Company now.

Q. Just a little bit louder, please. Did you ever lease a service station outlet from the Richfield Oil Corporation?

A. Yes.

Q. When was that?

A. May 28th, in '49 to January 16, in '50.

Q. Where was that service station?

A. Arguello and Geary Streets.

Q. Was that service station in San Francisco?

A. Yes, sir.

Q. Who installed you in it?

A. Joseph Kintano.

Q. How do you spell that name?

A. K-i-n-t-a-n-o.

The Court: What is it?

The Witness: K-i-n-t-a-n-o.

The Court: Are you sure it is a "K"?

The Witness: Yes.

The Court: Then it would not be an Italian name?

[fol. 2415] The Witness: He was not Italian.

The Court: Then that is all right.

By Mr. Greer:

Q. Do you know what his official capacity was with Richfield?

A. District merchandiser.

Q. Did he give you any instructions at that time as to what products you were to handle?

A. Yes.

Q. What instructions were those?

A. Richfield products.

Q. Did he tell you where you were to get your tires, batteries, and accessories?

A. Yes.

Q. Where?

A. At the Massei Auto Supply.

Q. From the City Auto Supply?

A. Massei.

Q. How do you spell that?

A. M-a-s-s-e-i, as far as I can get it.

Q. Was the Massei Auto Supply Company the official TBA distributor for Richfield?

A. Yes.

Q. Mr. Delucchi, directing your attention to the month of July, 1949, do you recall a conversation with Mr. Kintano in that month?

[fol. 2416] A. Yes.

Q. Do you recall what you all talked about at that time?

A. Sure. Yes.

Q. What did you?

A. Well, we talked about the government's suit against the Standard Oil, and I told him that I would start selling whatever I wanted to.

Q. What did he say to that?

A. He said I couldn't. And I told him that I could because the government guaranteed that I could.

Q. What was his reply?

A. He says, "Oh, no, you can't." He says, "If you do, they just won't sell you any more gas."

Mr. Greer: The witness is with you.

The Court: What kind of a station was this, an L-O?

Mr. DeMartini: Yes, your Honor.

Cross-examination.

By Mr. DeMartini:

Q. You mean by they wouldn't sell you any more gas that they would put you out of the station?

A. That's what he told me, they wouldn't bring me any more gas.

Q. What did you do before you were placed in this sta-
[fol. 2417] tion?

A. I worked down at the fruit and vegetable market in San Francisco.

Q. Didn't you work for a dealer, an L-O operator there, at Bay and Fillmore?

A. Yes.

Q. And you asked for a station to operate yourself, didn't you?

A. That's right.

Q. And Mr. Kintano or someone in Richfield secured you this station; isn't that correct?

A. That's right.

Q. At the time you were installed, Mr. Kintano or some other Richfield representative told you that you would have to sell Richfield products, and keep the station open, and be merchandised, and wear uniforms?

A. That's right.

Q. At the time the station was opened, Mr. Delucchi, isn't it true that Mr. Kintano spent some time with you around the station working with you and in conducting neighborhood solicitation, and so forth?

A. Well, everything so far as the neighborhood solicitation was concerned, he helped me.

Q. Now, during this time that you were at the station you became ill for while, did you not? Weren't you in the hospi- [fol. 2418] tal for a while?

A. Yes.

Q. And didn't Richfield merchandisers keep the station open for you during that time ?

A. Certainly.

Q. They worked there and accounted to you for the sales?

A. That's right.

Mr. DeMartini: Will you mark this for identification, please?

The Clerk: Defendant's Exhibit K marked for identification.

(The document referred to was marked Defendant's Exhibit K, for identification.)

The Court: I think even Mr. Dixon will admit you are nice people.

The Witness: They were a lot of help for me.

By Mr. DeMartini:

Q. You were what is known as an L-O operator?

A. That's right.

Q. And you held a 542 lease?

A. That's right.

Q. I will show you a document entitled "Application for Employment" dated May 19, 1949, and ask you whether that is not your signature.

[fol. 2419] A. That's my signature, yes, sir.

Q. And that was executed at or before the time you entered into the operation of this station · is that correct?

A. It is, yes.

Mr. DeMartini: I will offer this in evidence.

The Court: It may be received.

The Clerk: Defendant's Exhibit K in evidence.

(The document, heretofore marked Defendant's Exhibit K, for identification, was received in evidence.)

Mr. DeMartini: I guess that is all. Thank you.

Mr. Greer: One minute, Mr. Delucchi.

Redirect examination.

By Mr. Greer:

Q. When was this period that you were ill, Mr. Delucchi?

The Court: Just a moment.

Mr. Greer: Will you read the last question?

(The question was read.)

A. In October.

[fol. 2420] By Mr. Greer:

Q. October of?

A. '49.

Q. October 1949. You say that during that period Richfield employees operated your station?

A. Yes.

Q. Will you tell the court what arrangements were made whereby they were paid?

A. They were not paid by me, anyway.

Q. You did not pay them anything?

A. No. I had two men there. Either Joe Kintano or another man came in the morning to check out the men and started them off, and that is all.

Q. Did you continue paying for petroleum products that were delivered to the station in that time?

A. Yes.

Q. Who handled your books?

A. They did, but whenever a check was to be made they take it home to me.

Q. The question I want you to answer, Mr. Delucchi is, were the Richfield men who took care of that station compensated during that time?

A. No.

Q. Where were you immediately prior to taking over that station?

A. At Bay and Filmore, a Richfield station.

[fol. 2421] Q. Who operated it?

A. Al Schrier.

Q. Were you an assistant to him?

A. Yes.

Q. Why did you leave there?

A. To get a station of my own.

Q. Did you express that desire to the Richfield people?

A. Yes.

Q. What did you tell them?

A. I want another station.

Q. How big an investment did you have to make?

Mr. Paradise: Now, this, if the court please, is all direct examination, not redirect.

The Court: Yes.

Mr. Greer: If your Honor please, this was opened up by the cross examination.

The Court: I am not interested whether they may have done a good Samaritan act. Probably they were interested too. If they did not run it they would not get a profit. They would have to shut down the station. I am not interested in that.

Mr. Greer: All right, sir.

The Court: They may be nice people, they no doubt are.

Mr. Greer: All right, your Honor.

The Court: We are not interested in that. We are not [fol. 2422] trying their charitable impulses. We are interested in violations of the antitrust laws. That is all we are interested in.

Mr. Greer: We have no further questions, your Honor.
The Court: All right, step down. Call your next.
Mr. Greer: Mr. Garrett.

JOHN GARRETT, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: John Garrett.

Direct examination.

By Mr. Greer:

Q. Where are you from, Mr. Garrett?
A. From Boise, Idaho.
Q. What is your occupation there?
A. Salesmanager for D. N. Nordling Parts Company.
Q. How long have you been with that company?
A. 20 years in July.
Q. Would you tell the court something of the scope of the company's activity? What kind of business is it in?
A. We deal in replacement auto parts, accessories, etc., on a wholesale basis to service stations, garages, commercial fleets and accounts of that type.
Q. What is your geographical scope? How many states [fol. 2423] do you cover?
A. We cover all of Southwestern Idaho and Malheur County of Oregon with six stores.

Mr. Paradise: I did not hear your last statement.
The Witness: Malheur County in Oregon.
Mr. Paradise: Did you say "six" something or other?
The Witness: With six stores. We have six stores.
The Court: Malheur is spelled like in French Malheur, M-a-l-h-e-u-r.

By Mr. Greer:

Q. Do you sell in any other states besides Idaho and Oregon?
A. No, sir.

Q. Tell the court some of the products that you handle, Mr. Garrett?

A. By brand names do you mean or——

Q. Yes. For example, do you handle Fram filters?

A. Yes, sir, we handle Fram filters.

Q. Where do they come from?

A. We have ordered them from Providence, Rhode Island for many years. However, at present they have a warehouse in Ogden, Utah.

Q. Is that the home factory of the Fram Company, Providence?

A. Providence, Rhode Island.

Q. What kind of fan belts do you sell?

[fol. 2424] A. At the present we sell Gates.

Q. What kind of batteries?

A. Willard.

Q. Where do those Gates fan belts come from?

A. Denver, Colorado.

Q. Where do the Willard batteries come from?

A. Portland, Oregon.

Q. What kind of car polish do you sell?

A. DuPont.

Q. Where does it come from?

A. San Francisco.

Q. Mr. Garrett, are there any Richfield Service Stations in the area that your company services?

A. Yes, sir.

Q. That is, are there any service stations dispensing that brand of gasoline?

A. Yes, sir.

Q. Are there any in Boise?

A. Yes, sir.

Q. Directing your attention to such a station operated by a Sam Stewart at 118 South Capitol Boulevard in Boise,——

Mr. Paradise: May I ask if that was Sam Stewart you referred to?

Mr. Greer: Yes. Are you ready, counsel?

Mr. Paradise: Yes, we are ready.

[fol. 2425] Q. Do you recall calling on that service station in the year 1948?

Mr. Paradise: May it be stipulated, counsel, that the Stewart station is a Richfield L-O station?

Mr. Greer: It may be so stipulated.

A. Yes, sir.

Q. Do you recall attempting with the salesman under your supervision to sell your merchandise to that operator?

A. Yes, sir.

Q. Was that attempt successful?

A. Partly, yes.

Q. Would you tell the court what your experience was there?

A. We sold Mr. Stewart that day an order of spark plugs and attempted to sell him fan belts.

Q. Did he make a statement to you about the fan belts?

A. Yes. He said that the fan belts they handled were Goodyear and he had to stay with Goodyear fan belts.

Q. Did he say why he had to stay with Goodyear fan belts?

A. The company required it.

Q. By the company did he mean Richfield?

A. The Richfield Oil Company.

Q. Directing your attention to a service station operated [fol. 2426] by Harry E. Patton at 10th and State Streets in Boise, have you ever called on that station?

A. Yes, sir.

Q. When?

A. During 1948 and possibly early 1949.

Q. Would you tell the court what your experience was there?

Mr. Paradise: May it be stipulated, first, that this station is a Richfield L-O station?

Mr. Greer: So stipulated.

Mr. Paradise: And leased to Mr. Patton, and was at the time of the conversation?

Mr. Greer: Yes, sir.

Mr. Paradise: Thank you.

By Mr. Greer:

Q. What experience did you have at Mr. Patton's station?

A. The particular call that I remember that I was not

too pleased with, my salesman, Mr. Hanson, sold him a couple of filter cartridges and asked him to increase it to six cartridges on which he would receive a quantity discount or a quantity price, he having stocked No. C-4 Fram filters, which is a very popular number, and carried two or three in stock. We asked him to increase it to six filters. He said he could send them up. "If they catch me, I will have to send them back."

[fol. 2427] Q. How much did you sell Mr. Patton on an average during the period of his activity?

A. It would range from $50 to $60 a month up to possibly as high as $250-$300.

Q. Was he doing quite a bit of business in Boise?

A. He was one of our best accounts in the service stations.

Q. Was he subsequently terminated? All I will ask you is, did he subsequently leave that station?

A. Yes, sir.

Q. Do you recall when?

A. Yes, sir.

Q. Did you have any conversation with him at that time?

A. Yes, sir.

Q. What was the substance of that conversation?

A. He came into our store one morning and told me that he was leaving the station. Naturally, I was very much concerned as he was a very good account, and I asked him why. I couldn't understand. He says, "I am selling too much for Nordling Parts Company and not enough for Richfield."

Mr. Greer: The witness is with you.

Cross-examination.

By Mr. Paradise:

[fol. 2428] Q. How many accounts does the Nordling Auto Parts Company sell to, Mr. Garrett?

A. With all six stores?

Q. Yes.

A. We have approximately 1,000.

Q. Now, those accounts you mentioned, I believe, were service station accounts, garages and motor truck fleets?

A. That is right.

Q. Where are these six stores?

A. Starting at Burley, Idaho, Twin Falls, Idaho, Gooding, Idaho, Boise, Idaho, Nampa, Idaho, and Ontario, Oregon.

Q. Are those retail stores?

A. No, sir.

Q. How are those stores operated?

A. They are operated on a whole sale basis. However, if someone comes in and desires to buy a product, nationally advertised line of ours retail, we do sell them. However, less than 3 per cent is retail business.

Q. Do salesmen go out of those stores and solicit business in the area of the store?

A. Yes, sir.

Q. What is the relationship of the salesmen to the Nordling Company? Does Nordling Company employ them on a salary?

A. Employs them on a strictly commission basis.

[fol. 2429] Q. On a commission?

A. Yes, sir.

Q. Those are stores owned by the Nordling Supply Co.?

A. Owned by N. D. Nordling himself, personally.

Q. And leased by the company, I assume?

A. No.

Mr. Dixon: If the court please, I think this type of questioning is irrelevant and immaterial.

The Court: All right, go ahead.

A. Mr. Nordling owns the stores himself and operates them.

By Mr. Paradise:

Q. In those stores, as I understand, you carry Fram filters?

A. Yes, sir.

Q. And Gates fans and Willard batteries, by way of illustration?

A. Gates fan belts.

Q. Gates fan belts, yes.

A. And Willard batteries, yes, sir.

Q. Do you carry any other fan belts besides Gates?

A. No, sir.

Q. Do you carry any other filters besides Fram filters?

A. We carry a small selection of Purolator filters. However, we don't handle the line any longer. It is merely [fol. 2430] a close-out from several years back.

Q. Do you carry any other batteries besides Willard batteries?

A. No, sir.

Q. Do you permit your salesmen operating out of those stores on their own account and for their own benefit to sell Goodyear batteries?

Mr. Dixon: If the court please, I certainly object to that question. I think this type of cross examination has gone far enough and is immaterial.

The Court: I will sustain the objection.

By Mr. Paradise:

Q. Have the number of Nordlings accounts increased or decreased over the past five-year period?

A. They have decreased.

Q. Decreased. Would you state in what respect?

A. In volume of business.

Q. In number of accounts?

A. No, sir.

Q. Not in number of accounts?

A. Not in number.

Q. But in volume, yes.

A. In volume, yes.

Mr. Paradise: No further questions.

The Court: All right, step down.

[fol. 2431] Mr. Greer: Stand aside.

The Court: Call your next witness.

Mr. Greer: Mr. Christie.

Glenn Christie, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Glenn Christie.

Direct examination.

By Mr. Greer:

Q. Where do you live, Mr. Christie?
A. Boise, Idaho.
Q. Boise, Idaho?
A. Yes, sir.
Q. I believe that you are a salesman for the same company as the witness who just testified?
A. I am.
Q. How long have you been with that company, Mr. Christie?
A. Approximately nine years. Approximately nine years.
Q. Directing your attention, Mr. Christie, to a service station operated by a William L. O'Malley on Highway No. 30 at Nampa, Idaho, are you familiar with that station?
A. Yes, sir.
[fol. 2432] Q. What kind of gasoline does it sell?
A. Richfield.
Q. Have you ever called on that station in an attempt to sell products sold by your company?
A. Yes, sir.

Mr. Paradise: May it be stipulated, counsel, that this O'Malley station is an L-O operated Richfield oil station?
Mr. Greer: It is so stipulated.

Q. You have called on that station?
A. Yes, sir.
Q. Will you indicate to the court your experience there?
A. Well, I walked into his station there one morning when he was short on spark plugs and I noticed there was another man there but paid no attention to him at the time. I asked him for an order on spark plugs. He told me I should know better than to ask him for that order when there was a Richfield representative there. So I asked the Richfield representative if he expected the man to be without merchandise until such time as he could get it in there.
Q. Did you sell him spark plugs that morning?
A. No, sir.

The Court: You cut him off on a statement.

Mr. Greer: I beg your pardon, your Honor.

[fol. 2433] The Court: You did not tell us what he said to you.

A. He said, "No," he guessed he couldn't ask the man to do that, to wait until he could get plugs in.

The Court: All right.

By Mr. Greer:

Q. Did you sell him the spark plugs?

A. No, I did not.

Q. Directing your attention to a station operated by Oliver Lyle at 724—12th Avenue Road, Nampa, Idaho, are you familiar with that station?

A. Yes, sir.

Q. Did it dispense Richfield gasoline?

A. Yes, sir.

Q. Did you ever call in an attempt to sell your merchandise there?

A. Yes, sir.

Q. What was your experience at that station?

Mr. Paradise: May it be established the kind of station that these stations are, that they be identified as to their nature prior to the time the question is asked?

Mr. Greer: That also is a L-O station.

Mr. Paradise: And was at the time of the visit.

The Court: Yes, I want that myself. You noticed that I asked that question of the first witness. All right, go ahead.

[fol. 2434] By Mr. Greer:

Q. Did you call on that station?

A. Yes, sir.

Q. What was your experience there?

A. Well, I attempted to sell him Willard batteries.

Q. What was the reaction?

A. And we discussed the batteries and he made the statement that he did like the batteries but he couldn't sell them.

Q. Did he say why he couldn't sell them?

A. I asked him why and he said, "I can't display them here in the station." "However," he said, "I do have some

Willard batteries in my basement at the house I sell my customers when they ask."

Q. Did he say why he could not handle Willard batteries?

A. The company did not like for him to display them there.

Q. Did you sell him any?

A. No, I didn't.

Mr. Greer: That is all.

Mr. Paradise: No questions.

The Court: All right, step down.

Mr. Greer: Stand aside, sir.

The Court: Call your next.

[fol. 2435] Cecil H. Baker, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Cecil H. Baker.

Direct examination.

By Mr. Hall:

Q. Where do you reside, Mr. Baker?

A. Spokane, Washington.

Q. And what is your business?

A. I am a salesman for the Bearing and Rim Supply Co.

Q. Is the Bearing and Rim Supply Company located in Spokane?

A. 1204 West Second.

Q. How long have you been employed in that capacity?

A. Salesman for the past five years and I have been with the company 23 years in all.

Q. What is the territory covered by the Bearing and Rim Supply Company?

A. Our territory comes west as far as Wenatchee, south to Walla Walla and Lewiston, Idaho, and as far east as Billings, Montana, and north to the Canadian border.

Q. What are some of the principal products by brand names that you handle?

[fol. 2436] A. We have the complete A-C line. That includes fuel pumps, oil filters, filter elements, speedometer cables, fuel lines, the Exide battery, the Dayton rubber line, which includes Dayton fan belts and Dayton hose, and DuPont No. 7 products, and also the DuPont paint.

Q. What are the DuPont No. 7 products?

A. That is the chemical division of the DuPont Company, polishes and waxes and things like that.

[fol. 2437] Q. Now, in attempting to make sales of these products have you called upon stations that sell Richfield gasoline?

A. I have, sir.

Q. Can you name some of these stations?

Mr. Hall: And may it be stated, your Honor, that all of these stations are L-O stations, with which I am familiar?

The Court: All right.

The Witness: You mean the operators now, or the previous operators?

By Mr. Hall:

Q. The ones you have called on.

A. I have called on Don's Richfield service station, which is located in the 2000 block on East Sprague, Red's service station, which is on the corner of Sprague and Knapp, or Sprague and Thor, Cunningham's Richfield service at Division and Gordon, and Baker's Richfield service on West Broadway.

Q. Have you ever called on Mr. Lou Rhodes?

A. Yes, I have. He bought out Don McComb after he sold out.

Q. Now, relative to Red's Richfield service, will you state when you made your calls there?

A. Oh, I called when he first started in there, I called maybe twice a month, and we did a little business with him, and then the Richfield Corporation, so he tells me, was tightening down on him, and our business just gradually [fol. 2438] slacked off, and now I approximately call on him once a month.

Q. Did he make any other statements to you as to what Richfield's policy was with respect to tires, batteries and accessories?

A. Yes. He said he would like to buy our products, but Richfield would not O. K. them, and if he carried them he would have to hide them from the representatives.

Q. Relative to Cunningham's station on Division and Gordon, when did you call upon them?

A. You mean the last call, sir?

Q. Well, any calls on which they made any statements to you.

A. I called on them regularly about once a month, at that particular station.

Q. Were you able to sell them any products?

A. Yes. When Mr. Cunningham bought the station from Mr. Baker, or bought Baker's interest out, they were in there together in partnership first, and then Mr. Cunningham bought Mr. Barker's interest out, we sold them a lot of 48 oil filters at one time.

Q. A lot of what?

A. A quantity of 48 oil filters.

Q. What brand?

A. A-C.

[fol. 2439] Q. All right. Go ahead.

A. And when I called back on the next call, which was a month previous, or later, I should say, I noticed that the A-C oil filters were not being displayed any more, and I asked him what happened to them, and if he had sold them out. And he said, no, he had to take them off of display because they were not authorized by Richfield Corporation.

Q. Did you ever have any other experience at Mr. Cunningham's station with a Richfield representative?

A. Yes, I was calling on him not too long ago, I believe it was last fall some time, and I don't know the exact month, but it was, say, somewhere around September or October, and I propositioned him on his anti-freeze order for that particular fall. And while we was in there talking about it, why, a Richfield representative came in, whose name he told me was Mr. Neff after he had left. I didn't know the gentleman. I had seen him at other stations. He asked Mr. Cunningham if he didn't want to buy some oil, and he went ahead and made an inventory of the stock that Cunningham had on hand at that time, and he said he wanted him to buy 30 more cases of oil. Mr. Cunningham told him that he didn't believe he needed it right at that time. And the ques-

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tion came up jokingly of the requirements of having to buy this merchandise, and I spoke up and said, "Well, I would buy from whomever I pleased, and whatever merchandise [fol. 2440] my customers would want me to handle."

And this gentleman spoke up and said, "He can't do that."

And I asked him if he would put that in writing. So he immediately turned to Mr. Cunningham and asked him who I was.

Mr. Cunningham told him I might be a member of the Spokane police department, a sheriff, or a member of the F. B. I. And with that this gentleman walked out, and said he would see him later.

Q. Did he give you any statement in writing?

A. No, he did not, sir.

Q. Relative to Don's Richfield service on East Sprague?

A. Well, Don McComb was in that station during the war, and at that time he had purchased a very good stock of front wheel bearings for different cars, and during the war that merchandise was exceedingly hard to get. So this happened, I would say, in 1946 or early '47. He called me and asked me if I wouldn't come and make an inventory of this stock, there were some numbers that was low, and he wanted me to see if I couldn't take some of the numbers that was long, and take them back and exchange them for numbers that he was short.

So I was making this inventory, and a customer came in and asked Don if he wouldn't service his car for him, that he had to make a quick trip to Seattle, and he wanted the [fol. 2441] transmission changed and the differential, and the car completely greased, and the oil filter changed, and he said, "You can't handle the brand of oil I want, so I have purchased it and it is in the back seat of the car, and will you change that for me?"

Don said, "I'll be glad to." Don completed the work and let the car back down on the hoist, in preparation of putting the oil into the engine, and was taking it out of the car and placing it on the bench to put it in the car, when this Richfield representative walked in.

I didn't know at the time who the gentleman was, but I learned later it was Mr. Neff. And there was quite an argument come up about this particular oil, and Mr. Neff's part-

ing words to Mr. McComb was that if he ever caught any more Quaker State oil in that station, that he would cancel his lease immediately.

Q. Did you ever attempt to make any sales to Don's successor, Lou Rhodes?

A. Yes, I did, sir, but I didn't have very much success, because he said he was being held very strictly to Richfield products, and due to that, why, I didn't call on him any more.

Q. Will you tell us where the Bearing & Rim Supply Company gets its Exide batteries?

A. It comes from Ohio.

[fol. 2442] Q. And the A-C spark plugs? And filters?

A. Flint, Michigan.

Q. And the fan belts and hoses?

A. Dayton, Ohio.

Q. And where did your oil products come from?

A. San Francisco.

Mr. Hall: You may take the witness.

Cross-examination:

Mr. Paradise: It is stipulated that all of the stations that were referred to by Mr. Baker were L-O stations?

Mr. Hall: Yes.

Mr. Paradise: At the time of these discussions?

Mr. Hall: Yes.

By Mr. Paradise:

Q. Mr. Baker, at the time of this discussion at the McComb station were you a member of the F.B.I.?

A. No, sir, I am not.

Q. How long have you been a salesman of these products?

A. I have been in the territory selling them for about six years, sir.

Q. You were familiar with the fact, were you, Mr. Baker, that various oil companies own service stations in the territory in which you operate?

A. Yes, sir.

[fol. 2443] Q. And also that various companies lease service stations in the territory in which you operate?

A. Yes, sir.

Q. Are you also familiar with the fact that Richfield Oil Corporation does that?

A. Yes, sir.

Q. And that some of the stations displaying the Richfield brands are owned in fee or leased by Richfield?

A. That's correct.

Q. You are also aware of the fact, are you not, that the operators of those stations have subleased them from Richfield?

A. Yes.

Q. When you approach a service station bearing Richfield colors, do you inquire of the operator at the time you solicit his business whether Richfield owns that station?

A. No, I do not, sir.

Q. You make no inquiry of that sort?

A. No, sir.

Q. Do you inquire whether Richfield has a lease on the station?

A. No, sir, I do not.

Q. Do you inquire whether the operator of that station has leased it from Richfield for a particular purpose?

A. No, sir.

[fol. 2444] Mr. Paradise: That is all.

Redirect examination.

By Mr. Hall:

Q. Just one question. You didn't tell this Richfield representative you were an F.B.I. agent, did you?

A. No, sir, I did not.

Mr. Hall: That is all.

The Court: Step down.

(Witness excused.)

The Court: All right, gentlemen, before we continue we will have a short recess.

However, gentlemen, I want to make a brief announcement. We are going to go on until 12:30, and then I will take an adjournment until 2:30, because I desire to attend the funeral of a very distinguished member of the bar, Mr. Hubert T. Morrow, who died just the other day. Mr. Mor-

row, as you know, was very prominent in the activities of the Los Angeles Bar Association. He was a former president, and he was very active in the Association while he was president, and was the originator of what is known now as the Junior Group of the Bar, the junior barristers. He had a very distinguished career here, and his death is a real loss to the Bar, because he represented a very high type of lawyer, of which this Bar has many. So we will make that [fol. 2445] arrangement so that there will be no loss of time by my attendance at the services to pay my respects to a friend.

(A short recess was taken.)

The Court: Call your next witness.

Mr. Hall: Mr. Burris.

Loren J. Burris, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

The Clerk: What is your name, please?

The Witness: Loren J. Burris.

The Clerk: The spelling of your first name, please?

The Witness: L-o-r-e-n.

The Clerk: And the spelling of the last name?

The Witness: B-u-r-r-i-s.

By Mr. Hall:

Q. Your residence, Mr. Burris?

A. Spokane, Washington.

Q. And your occupation?

A. I am a part owner and the outside salesman for G & M Auto Supply.

Mr. Paradise: What was the name of the company?

The Witness: G & M Auto Supply.

[fol. 2446] By Mr. Hall:

Q. Where are they located?

A. At 2nd and Washington in Spokane.

Q. Will you name some of the principal brand names of the automotive accessories which your firm handles?

A. We carry the Toledo Motor Parts line, A-C filters, Purolator filters, Sale power rings.

Q. And what batteries?

A. Willard batteries.

Q. Spark plugs?

A. Champion spark plugs.

Q. Light bulbs?

A. G. E. and Westinghouse.

Q. Fuel pumps?

A. Airtex.

Q. In your attempts to make sales of these products your company handles, have you called upon stations which sell Richfield gasoline?

A. Yes, I do.

Q. Calling your attention to a station operated by Walter Connor at 3427 Northwest Boulevard, I will ask you if you ever called on Mr. Connor?

A. I called on Mr. Connor——

Mr. Paradise: Just a moment, please. Is this an L-O station?

Mr. Hall: I will state, your Honor, all of these stations [fol. 2447] are L-O stations.

The Witness: I called on Mr. Connor several times. Mr. Connor wasn't there very long, and I now do call upon his successor. It is Jim's Richfield station now. I forget the owner's last name.

By Mr. Hall:

Q. Now, while we are on Mr. Connor, do you remember when it was he was in the station?

A. No, I don't. It is approximately a year ago or a year and a half ago.

Q. Did you make any attempts to sell him any of your products?

A. Yes, I did. However, with Mr. Connor, the station was quite run down, and it didn't look—I mean he just wasn't buying very much from anyone.

Q. Did he give you any reason why he didn't purchase any particular articles from you?

A. Mr. Connor didn't, no.

Q. Now, what about his successor, this Jim's Richfield service?

A. Jim and his wife, yes. I knew them prior to their going into the station, and I called on them when they first started, and they said that they liked G & M Auto Supply, and they would be glad to give me some business, but, however, it would take them until they built up their accessory business, as they had to buy all their standard mer-
[fol. 2448] chandise from Richfield, their Purolators, and spark plugs, and that merchandise, and I couldn't expect any of that.

Q. Calling your attention to McKinney's Richfield service station on South Grand in Spokane.

A. I called on Mr. McKinney—he is fairly close to us—maybe once a month. Mr. McKinney—at one time I suggested to Mr. McKinney that I call on him every week when I was up there, that maybe I would get more of his business. We had quite a pick-up business on him at the store. He would pick up a Gates fan belt, or something that he was out of. And he said there really wasn't much use in calling any oftener because he had to buy most of his stuff from Hobson, who was the Richfield dealer up there, and that he would still continue to pick up his shorts from us, stuff that he needed within the next hour or half hour, but there was no use in calling more than once a month.

Q. Will you explain the term "shorts"? Is it things that he needs immediately?

A. That is right.

Q. Calling your attention to John Farnsworth, on West 303—or on West 30 3rd Avenue in Spokane, have you made attempts to sell him?

A. I have sold Mr. Farnsworth for the past five years. Prior to taking over the station he was in a garage in the same neighborhood, and that is within two blocks of my store.

[fol. 2449] Q. Give us your experience with Mr. Farnsworth since he leased this station from Richfield?

A. Mr. Farnsworth will not give us any of his stock orders, filters, or merchandise like that. However, he does—he is at the store ten times a day picking up merchandise and motor parts.

Q. Has he ever made any statements to you as to why he will not carry your line of products?

A. I can't remember offhand him making a statement. It was more or less an understanding between us that I won't bother him for the stuff that he is supposed to buy from Richfield.

[fol. 2450] Q. Calling your attention to the Robert Stone station at Main and Division Streets in Spokane, Washington, will you tell us what experience you had with Mr. Stone?

A. Yes. I met Mr. Stone. He was working for the Shell Company in a Shell operated station as an employee of the Shell Company, and he was taking over a new Richfield station. I believe this was in the fall of '48. And he came in the store. I had never met the fellow before. And said he understood that we had some permanent anti-freeze and that he was going into a new station and he would certainly appreciate any that we could give him. And we did have a carload of anti-freeze that we had just received.

Q. Did he make any statements at that time about his purchasing that anti-freeze from Richfield Oil Corporation?

A. He said that he was opening a new station and that Richfield had no anti-freeze for him, and at that time of year in Spokane, I mean, it was quite a disadvantage for a new station not to have even a case of anti-freeze.

Q. In connection with this anti-freeze deal did you at the same time or around the same time talk with Al Cloninger?

A. Yes. He brought Mr. Cloninger in the second day. I didn't give——

Q. Who was Mr. Cloninger?

[fol. 2451] A. Mr. Cloninger was the retail representative for Richfield at the time.

Mr. Paradise: We will stipulate Mr. Cloninger was a merchandiser.

Mr. Hall: Was a merchandiser.

A. A merchandise man. I didn't give him a definite answer. I told him I would have to talk it over with my partner. We were interested in other business besides anti-freeze business, because we could have given that to anybody.

Q. Tell what your conversation with Mr. Cloninger was.

A. Mr. Cloninger—Mr. Stone brought Mr. Cloninger in and introduced him to me and we discussed giving Mr. Stone a hundred gallons of anti-freeze to kind of open this big station with a splash and help him out. But the thing—I said I just didn't like to do it because there was no possibility of getting any new business. This was to Mr. Cloninger. And he said, "Well, you sell a lot of merchandise that Lee Hobson doesn't sell. Bob can buy some of that from you."

Q. What were some of those items mentioned?

A. He mentioned specifically, he said, "Bob, you are going to need front wheel bearings. Why can't you buy some of those from Larry?" That was the gist of the conversa-[fol. 2452] tion. In other words, it was an agreement that——

Mr. Paradise: We are not concerned with that.

The Court: Just repeat the conversation, not the agreement.

Mr. Hall: Just the conversation.

Q. Did you ever have any experience with Don McCombs, Don's Richfield Service on East Sprague?

A. Yes, I did. I called on Don for—oh, I would say over a year prior to the time he sold out. I sold him—oh, from $25 to $50 worth of merchandise a month.

Q. Was it merchandise that was competitive to Richfield's approved merchandise?

A. At first I did succeed in selling him some battery cables, but after he bought the original order of battery cables he told he would have to cut it out.

Q. Did he explain why he would have to cut it out?

A. Yes. He said that Hobson and Neff had raised so much trouble for him that he would have to quit, discontinue buying them from me.

Q. Did you have any experience with attempting to sell any products, or any other business experience with Lou Rhodes and his successor at that same station?

A. Yes, I did. When I was calling on McCombs every week prior to the time he sold out, and when Rhodes came in I called on him, and he told me that he had gone in

[fol. 2453] there—Don had gotten into so much trouble on account of buying so much stuff outside of the Richfield TBA, that he was going to stick pretty close to Richfield, in fact he had to. So I didn't do very much business with Rhodes for, oh, a year. I quit calling on him regularly, but I would stop in once a month or so. After he was there a year or so I did a little better. However, I didn't sell any merchandise that Richfield had. I sold him other accessories.

Q. Do you recall the incident of the Lincoln batteries which Don had in his station when he turned the station over to Mr. Rhodes?

A. Yes. Don had—in fact, that was one of the things that caused him so much trouble with Richfield. He insisted on selling these Lincoln batteries because he bought them better and there was a better guarantee on them than the Goodyear. And when he decided to sell out and get out of the business——

Mr. Paradise: May I object. The question calls for testimony concerning conversation.

The Court: He is relating conversation. Aren't you telling us what he told you?

The Witness: I am telling you what he told me, yes.

The Court: All right.

A. He told me that he was not going to be able to sell the batteries to Lou Rhodes and asked me if I would try to sell [fol. 2454] them to some other service station operator for him, see if I could dump the whole thing. He had 15 or 18 batteries and he wanted someone to just take the whole thing at less than it would cost to buy them from the supplier or jobber. I was not successful in moving them. I did have a couple of operators call him, but their idea of a close-out price and his were not the same. So, as a result, they were not sold.

By Mr. Hall:

Q. Will you state what the general policy is with relation to the continuance of the guarantee on batteries from the sale of one retailer to another retailer?

Mr. Paradise: Objected to as immaterial.

The Court: Overruled.

Mr. Hall: It is to show the difficulty of disposing of these, your Honor.

The Court: Yes. All right, go ahead.

A. Well, that voids the warranty. In other words, the original jobber is no longer required to replace defective batteries. The warranty on the battery is to the original dealer.

By Mr. Hall:

Q. And will you state whether or not that was a significant matter in your attempt to dispose of these batteries for Mr. Lou Rhodes?

A. That is right. That is right. In other words, the fellows that I asked to buy the batteries figured that they [fol. 2455] should buy them at a considerably reduced price because they would have to stand their own guarantee on them.

Q. How long have you been in this business, Mr. Burris?

A. I have been with G & M Oil people for four years.

Q. When you first came with G & M how often did you attempt to contact Richfield service station operators?

A. Oh, whenever I came to them. In other words, prior to my coming into G & M Oil Supply it was a new firm, had been established a year prior to that. They had no outside salesmen and there was no regular route of call or regular established outside business, and as a result, I just went around calling on anyone that looked like they were selling merchandise, moving merchandise, trying to build a business.

Q. Did you find that your sales attempts with the Richfield operators were successful?

A. No, I didn't. I found that with myself trying to cover the entire City of Spokane, that I had better—my time was better spent some place else.

Q. Presently in your sales operations do you make the same number of calls on Richfield stations that you did when you first went into the business?

A. No. No, I don't.

Mr. Hall: You may have the witness.

Mr. Paradise: Your statement, as I understood, at the beginning was that it was stipulated that all the persons [fol. 2456] and sales concerning which Mr. Burris testified are L-O operators and L-O stations?

Mr. Hall: Yes.

Mr. Paradise: So stipulated. No questions.

Mr. Hall: All right, Mr. Burris.

The Court: Step down. Call your next witness.

Mr. Hall: Just one thing, Mr. Paradise, please. The stipulation I made, of course, does not apply to that last statement.

Mr. Paradise: Which one?

Mr. Hall: It was a general statement, his calls on Richfield stations.

Mr. Paradise: If that be true, if the court please, I move that the answer be stricken because I understood Mr. Hall's statement at the beginning to be that he was only going to direct it to L-O stations.

Mr. Hall: Specific statements. I did not realize at the time that Mr. Paradise asked for that stipulation.

Mr. Paradise: Now, that is a critical matter, if your Honor please, as counsel knows, and I am relying upon Mr. Hall's statements that these were all L-O operators.

Mr. Hall: The specific ones mentioned were all L-O's. I do not know what ones he has called on.

The Court: The specific ones mentioned, but there is no evidence that he called on any others so far unless you point [fol. 2457] to some station that was out of the category. There is no evidence.

Mr. Hall: There was just the general statement that he called on Richfield stations. That was all, your Honor.

The Court: The evidence before the court as far as this witness is concerned is that the only stations he called on were L-O stations. There was no evidence they were of a different type. If you want to show they were of a different type than that, put someone else on for that. I don't think he knows.

Mr. Hall: I doubt it.

The Court: All right. So we stand where we were before.

JAMES T. SMITH, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: James T. Smith.

Direct examination.

By Mr. Alexander:

Q. Where do you live, Mr. Smith?
A. Los Angeles.
Q. Have you ever been the lessee of a service station for the Richfield Oil Corporation?
A. I have.
Q. Will you state the location of that station and when? [fol. 2458] A. 11401 South Figueroa Street, at the southwest corner of Figueroa and Imperial Highway, Los Angeles.
Q. When did you enter into negotiations for the occupancy of this station?
A. I entered into negotiations in December 1941. My lease was signed January 1942.
Q. Did you have conversations with Richfield representatives in connection with the negotiation for this lease?
A. I did, numerous times.
Q. Who were the Richfield representatives present at the time, December '41, when negotiations were conducted?
A. Mr. Kenny White, and I am very sorry I can't recall the other person's name.
Q. Mr. Kenny White and another?
A. Mr. White and another representative of Richfield. I can describe him. Maybe someone else will know his name.
Q. Can you relate to the court in substance what the nature of this conversation was in connection with negotiations for this lease?
A. Well, I was operating across the street from them and the owner of the property that the Richfield lease was on was a very good friend of mine and he, through his connections with Richfield——

Mr. DeMartini: I will object to this line of testimony, [fol. 2459] your Honor. Limit it to conversations.

The Court: Let us get down to the approach, not the manner of approach.

A. I met in my home with Mr. White and the other Richfield man before, or, that is, during the time we were attempting to draw up a lease for this station, and the discussion was handling Richfield gasoline and oil.

Mr. Alexander: Is it stipulated that the Form 542, print date 9-41, executed January 9, 1942, effective January 12, 1942 was entered into between the Richfield Oil Corporation and James T. Smith?

Mr. DeMartini: So stipulated.

By Mr. Alexander:

Q. Mr. Smith, I show you this Form 542. Is this your signature here?

A. It is.

Q. Calling your attention to the paragraph entitled "term", will you read that, please?

A. "To have and to hold unto"——

Q. No. Excuse me. Read it to yourself.

The Court: Read it to yourself.

The Witness: Oh, I am sorry.

By Mr. Alexander:

Q. Did you have any conversation with Richfield representatives in connection with that paragraph you have just read?

A. Yes. I discussed that with Mr. White and he said [fol. 2460] it was a thing that I didn't especially need to worry about. He said that they didn't often write an operator out.

Q. Did you subsequently have a discussion with Mr. Phelps concerning that same provision?

A. Yes, I had quite a discussion with Mr. Phelps, and Mr. Phelps informed me that—Phelps was a fellow that used an expression "play ball." That was one of his pet expressions. He said as long as I played ball with Richfield that I would be all right. He also informed me during this discussion that they had a ground lease for 10

years with a five-year option and that in his opinion I would be in there for 15 years.

Q. Mr. Smith, at the time you took occupancy of this station did you make an investment?

A. I did. My investment for equipment and stock was—oh, approximately $1,500, possibly $1,600.

Q. Was this a new station that you took occupancy of, Mr. Smith?

A. It was a new station.

Q. After you had been there approximately 90 days what was the gallonage as you recall?

A. The first 90 days, as I remember, it was about, for the first 90 days totaled between 50-54,000. My opening month was approximately 18,000 gallons, and it held that way and a little better from then on.

Q. Calling your attention to April of 1942 do you recall [fol. 2461] having attended a meeting in Masonic Temple in Long Beach at which Richfield representatives were present?

A. I did. The——

Q. Excuse me.

A. Yes, I attended the meeting.

Q. Do you recall any discussions that were held there at that time?

A. The instructions were at this meeting—it was a regular sales meeting, which is common in the gasoline business, and we were informed by the speaker that things would probably get a little rough during war, that we could expect gas rationing and that we would probably lose part or possibly all of our help, and it was their idea that we should do anything possible to keep the Richfield gas stations open. The speaker said to sell real estate, sell automobiles, take in laundry if you feel like it, but do anything to keep the stations operating.

Q. Mr. Smith, did you have any discussions with any Richfield representatives in connection with the handling of Richfield oil?

A. Yes.

Q. Can you recall——

A. We agreed to that orally when I went in the station.

Q. Did you subsequently have any occasion arise where you had discussion concerning that original arrangement?

[fol. 2462] A. Well, I had an occasion where I had been told to keep the station open if possible. I had the opportunity to contact two or three outfits to do their service work, but in this service work I had to furnish them a certain kind of oil in order to sell them gasoline. And I took that up with the merchandise man and he said it was not good, but if I did do it and he did not see it, nobody would know it but he and I.

Q. Did you take the account on?

A. I did.

Q. What was the type of oil that you handled in this connection?

A. Pennzoil.

Q. Calling your attention to the spring of 1943, do you recall the purchase of some Richfield lubricating oil?

A. Yes, sir. There was a fellow by the name of Mr. Bingham that had been in the trucking business. He lived a long block from my station and he had 22 barrels of Richfield oil, Rich Lube and Pennsylvania, mostly Rich Lube, and he had lost most of his help through the armed forces and had had a wreck, and he got mad and decided to go out of business. He came into my place and wanted me to buy his oil at a reasonable price, and I did.

Q. Did you subsequently have discussion with Richfield representatives in connection with this purchase?

A. Not at that time. In fact it was more than a year [fol. 2463] before they found out where it came from.

Q. Well, I mean did you have discussions with Richfield representatives?

A. Before I bought the oil?

Q. No, subsequent.

A. No. I don't quite understand the question.

Q. You stated, Mr. Smith, that you did purchase the oil from Mr. Bingham.

A. Yes.

Q. Did you subequently have discussions with Richfield representatives in connection with the oil that you had purchased?

A. At that time, no. I did later.

Q. Oh, I see. That is clear. Will you relate those conversations that you had later?

A. Well, you see, this oil that I bought from Mr. Bingham, I brought it down through the alley, just rolled it in the barrels. We didn't truck it in or anything, and rolled it up onto a vacant lot back of my station. I turned the Richfield label towards the station where they could easily be seen, and the representative of Richfield didn't know where the oil came from as long as the "Richfield" showed on it. Nobody said nothing. But while I was working that, I was using this oil that I purchased from Mr. Bingham along with oil that I was buying from Richfield, and I was [fol. 2464] buying just enough to keep the wolf off my neck.

Q. Now, did you subsequently have discussions with Richfield representatives in connection with that purchase?

A. Yes.

Q. Will you relate it to the court?

A. Well, he told me that I was a bad boy, I shouldn't have got it.

Q. Who told you this, Mr. Smith?

A. The Richfield representative, the merchandise man.

Q. Mr. Smith, did you handle automotive accessories at your station?

A. I did.

Q. From whom did you purchase these automotive accessories?

A. Do you mean the names of the companies?

Q. Yes.

A. I bought from Jewel Auto Supply, Baird Auto Supply, and I bought some accessories from Mr. Doucette and Mr. Cheney.

Q. Are these latter two also TBA representatives of Richfield Oil Corporation?

A. They are.

[fol. 2465] Q. Will you relate the conversation you had in connection with the first time when Mr. Doucette was brought to your station?

A. The first time Mr. Cheney came into my station I had been told he was coming and I had, oh, I had numerous things in there that he didn't handle. I had Jewell batteries, and I had another battery made by Cesan, just a few, not many. You couldn't get too many. And, naturally, I wanted to do some business with Mr. Cheney because he had some

tires and that was the hedge then, everybody wanted tires. And I bought a little merchandise from Mr. Cheney. I took an order of batteries, and I bought some gas caps, gas caps, and radiator caps. And then at a later time I bought a little more stuff, and I was trying to buy enough merchandise so he would give me some tires. Well, I was never successful in getting any tires through him, so I quit buying from him.

Q. Did you have any discussion with any Richfield representatives in connection with the determination to quit buying from him?

A. Well, at the time I quit buying from him, the information was relayed down to the Watson office, and I was called on the phone, and asked why, and I explained why I quit buying from him, that the explanation was very simple, that I could buy a battery with the same guarantee——

Q. I asked you, Mr. Smith, to whom did you make this [fol. 2466] explanation?

A. Mr. Phelps.

Q. Who is Mr. Phelps?

A. The depot manager.

Q. A Richfield employee?

A. Yes, the Watson depot manager. And, anyway, I explained I could buy the batteries with the same guarantee, and get them local without any difficulty. In other words, the supplier I was getting them from was only two or three blocks from my place, and it was convenient for me to get this other battery, I could buy it better, and in case of an adjustment I could get an adjustment quicker than I could at Richfield.

Q. When you say "buy it better," you mean at a more favorable price, with a larger margin?

A. I could get the same battery with the same guarantee at $2.30 to $2.70 less than the Goodyear, sir.

Q. Did you buy the Goodyear?

A. I could buy the Jewell battery less than the Goodyear battery. That was the reason for handling the Jewell battery.

Q. Did you have any discussions with Mr. Doucette in connection with the handling of the approved merchandise of Richfield?

A. Mr. Doucette came into my place, and I was told he

[fol. 2467] was coming, and he came in, and I had a very good line of merchandise. I mean I had a long line. I had quite a few things that he did not have, and I had some things that he did have. I was handling the Gates fan belt, and he wanted me to shift to his fan belt. In fact, I did buy some fan belts from him, and I bought some of his radiator hose, because I was still trying to buy enough merchandise from him so I could get some tires. And then I had, oh, different things, a few things that he didn't have. Some of the stuff he wanted me to buy I didn't buy, and some of his merchandise I did buy. And the dispute I had with Mr. Doucette was, I was buying Puralator elements at about five to eight per cent less than I could buy the same merchandise off of him, and I had the same condition in the Champion spark plugs. I was buying Champion spark plugs from another supplier in any lot I wanted it, I mean one or a dozen.

Q. Excuse me. Are the Champion and the Puralator the approved merchandise?

A. They are the approved merchandise of Richfield, and I could buy the Champion spark plugs about four cents cheaper from one source than I could from Mr. Doucette, the same plug, same number.

Q. Mr. Smith, you referred to a conversation you had with Mr. Phelps. Will you relate what was the nature of that conversation you had in connection with your TBA [fol. 2468] purchases you have just related?

A. Mr. Phelps informed me I was to buy this, which I didn't dispute, and I told him I would, because he was a big boy. And I did buy a considerable amount through Mr. Doucette, but I didn't buy as much as they expected me to. Consequently, I was told that I wasn't playing ball with them, and I wasn't co-operating with their sales staff. I explained to him that I could buy the plugs from another source, and he immediately wanted to know what the other source was. And I didn't tell him at first, but he found out, and the person I was buying the plugs from at this 37 cents came to see me about it, and asked me why I told him.

I told him, "I was in a crack, and what could I do?"

He said, "Do you know I was likely to lose my franchise over it?"

And I said, "I am very sorry, or I wouldn't have said anything."

Q. When did you leave the station you leased from Richfield?

A. When did I close out?

Q. When did you leave?

A. January, 1946.

Q. Did you have a conversation with Richfield representatives prior to your leaving that ser ice station?

A. From six to eight hours a day, when I could get to [fol. 2469] them, for the last two or three days.

Q. Now, calling your attention—did you state when you left the station?

A. The date?

Q. The approximate date.

A. January,—well, I will tell you exactly.

Q. January,——

A. January the 9th, 1946.

Q. Did you have a conversation with Richfield representatives in December of 1945?

A. In December of '45 they had a new—brought in a new merchandise man, a little fellow, a nice little fellow he was, and he told me that I had been warned numerous times about having Pennzoil in my place.

I said, "Now, look. I haven't got Pennzoil in here." I said, "It's around in the garage. I had to put it in the garage, I had to get it out of sight, because they were closing the gate on me and had me trapped off base, and I knew it, so I put my Pennzoil in the garage."

And he told me I just had to get it out of there. He said, "The pressure is on, and you must do it."

Q. Did you have any conversation with Mr. Phelps at this time?

A. Mr. Phelps called me in his office on the day that I received the letter, January, the 9th, and at the time I went [fol. 2470] in the place, of course, I was—the letter was there, and that was it. And he told me I had been a bad boy, he read all the bad things off which I had done, which I didn't deny.

Q. What did he say, Mr. Smith?

A. Well, he said that I didn't co-operate with his TBA

men in buying their merchandise, and I explained to him that I was buying some. He said he knew I was buying some, but I wasn't buying all of it. He said I was just buying enough to keep some on the shelf, to keep the wolves off my neck.

So, anyway, Mr. Phelps also told me that he had been trying to get me to get the Pennzoil off the place for a long time, and I had consistently refused on it, and lied to him about it, which I didn't deny, that I had had it in the garage, still had it, but I wanted the business of these outfits that insisted on using Pennzoil, that I still was keeping the thing in mind of building good will for Richfield and I had a very good business, and I wanted to keep my business, and I was trying hard to keep it, although I knew I was trapped off base. And I explained to him the situation, and I said, "You know what I've done." And I said, "That's water under the river. How about giving me another chance at this?"

Well, he wouldn't do it. So I came back to the place, and called downtown and talked to Mr. Clune, and wanted to [fol. 2471] talk to Mr. Little, and they wouldn't let me, they said Little was out, which was all right.

Q. What was that?

A. I wanted to talk to Mr. Little.

Q. Who is Mr. Little?

A. He is the vice-president in charge of sales, I believe. Anyway, he was over Phelps, so I was trying to get around him to higher quarters to see if I could make a legitimate deal.

I asked Mr. Clune about letting me put up a bond that I would keep Pennzoil out of the place and to keep other unapproved merchandise out of the place. I offered to let them have a representative to come up and inventory the place, and offered to give them a cash bond guaranteeing I would keep it out. And Mr. Clune said he was sorry, it was out of his hands, and if Mr. Phelps saw fit to check me out, that was up to Mr. Phelps.

Q. I show you this letter, Mr. Smith, and ask you if that is the letter you testified you received.

A. That is it.

Mr. Alexander: The government asks that the service station lease, form 542, No. 9-41, be marked as Exhibit next in order.

The Court: All right.

The Clerk: Government's Exhibit 23, marked for identi-
[fol. 2472] fication and Government's Exhibit 23-A, marked for identification, being——

Mr. Alexander: Being the letter from the Richfield Oil Corporation, signed by H. W. Vossler, to Mr. James T. Smith, dated January 9, 1946.

(The documents referred to were marked Plaintiff's Exhibits 23 and 23-A, for identification.)

Mr. Alexander: The government offers these in evidence, your Honor.

The Court: They may be received.

The Clerk: 23 and 23-A in evidence.

(The documents, heretofore marked Plaintiff's Exhibits 23 and 23-A, for identification, were received in evidence.)

By Mr. Alexander:

Q. Mr. Smith, will you relate the circumstances under which Government's Exhibit 23-A was received by you? Briefly, if you will.

A. This was sent to me through mail, by registered mail, and it was received by one of the men in the station. I didn't receive it myself.

Q. Did you have any conversations in connection with the receipt of it, after you had received that letter, with Richfield representatives?

A. Yes, I had numerous. I say numerous, I talked to everybody I could get to, trying to get them to change their
[fol. 2473] mind. I was fighting for my neck. I was trapped off first base, way off.

Q. Now, Mr. Smith, calling your attention to the day prior to January 9, 1946, will you relate to the court the circumstances of the experiences that you had at your service station?

A. I don't quite understand what you mean. Is that the day I was checked out, or the day before I was checked out?

Q. The day you were checked out.

A. The day I was checked out?

Q. Yes.

A. The day I was checked out, they came up there. They were supposed to be there at 10:00 in the morning, and I was there with my bookkeeper.

Q. Who is "they"?

A. It was Richfield representatives, two representatives from Richfield, two men that were taking over the station, myself, and my bookkeeper, the six of us. Is that who you mean?

Q. Were you acquainted with the Richfield representatives by name?

A. One of them.

Q. What was his name? If you know; if not——

A. He was the new man, and he had only been there a [fol. 2474] couple of months. He was the little fellow.

Q. Will you continue on, Mr. Smith, with what took place?

A. They came up to check me out. They brought their forms, of course, like the usual procedure, and I had took practically all or as much of the merchandise out of my place as I could personally get out. So we took the inventory, and started on the right side of the building, and went in a circle.

My bookkeeper was writing down the inventory, and their man, the Richfield representative, was writing it down, on the instructions from the fellow that was taking the station, Mr. Skinner, and myself, and one other of the Richfield men. Richfield had two men. The two people each had two persons there, and we went right around the station, and all the merchandise that was what they called company-approved merchandise, they put it on the inventory. The other stuff, that wasn't put on the inventory. It was taken out of the place and loaded into a truck, and I returned most of it to the sources I bought it. Some stuff,—in fact, I still got some of it, such as used spark plugs.

Q. You said you made an inventory. Did you make an estimate of the value of the inventory put in the truck from the station?

A. The merchandise I took from the place, that my suc- [fol. 2475] cessor didn't accept, it was $422 worth of

merchandise. You wanted to know the value of it, was that it?

Q. Yes.

A. Yes, that was what it was. It was radiator hose, a few tires, and tubes, that wasn't approved, a very few batteries and fan belts.

The Court: All were unapproved items?

The Witness: Yes, all were unapproved items. I believe I had a little more than $100 worth of fan belts. That was the biggest single item, the Gates fan belts.

By Mr. Alexander:

Q. What did you do with these items?

A. Some I took back to the supplier, some I sold to other dealers, and some I still have, a very few.

The Court: Did you go into the same business for another concern?

The Witness: I did later, yes, and I have used some of the stuff there.

By Mr. Alexander:

Q. Mr. Smith, one further question: Did you execute any form of agreement with the Richfield Oil Corporation at the time of your termination, that notice and the termination was agreeable with you?

A. Now, that's a question that I am sure I can't truthfully answer. I probably—I say I did probably, did sign off on the thing. If I didn't, my bookkeeper did for me.

Q. You probably did what?

[fol. 2476] A. Sign the release. There was quite a few papers to be signed, like the transferring of the inventory, and whether I signed the release on the station I truthfully couldn't answer.

The Court: You were out, anyway?

The Witness: I was out, definitely; way out. I'm still out.

Mr. Alexander: No further questions, your Honor.

The Court: All right.

Cross-examination.

By Mr. DeMartini:

Q. I believe you testified, Mr. Smith, that Richfield objected to your buying Richfield lubricating oil from sources other than directly from the company; is that correct?

A. Yes, sir.

Q. On that sale Richfield would realize no profit; is that correct?

A. Right.

Q. I will show you an instrument, that is, a Form 542, dated January 9, 1942, and ask you to state what the rental under that lease was.

A. It was to be $70 a month minimum, with one cent a gallon for over 7,000 gallons.

Q. This lease does not so state, Mr. Smith. It states [fol. 2477] it is $70 flat.

A. That is the first lease?

Q. I believe so.

A. Well, the first three months I was in there Richfield gave me a break in this respect, that, as I remember now, I am not positive, but I don't think I paid any rent the first three months. Perhaps $1 a month, because they were having difficulty getting the place opened. That's the lease all right, but I think they attached a rider to that to waive that for three months.

Q. Now, I will show you a rider dated July 14, 1942, and ask you whether the rider under that lease is not $35 per month.

A. That is $35, yes. They reduced that before rationing came in.

Q. And then the next rental amendment was dated February 10, 1943, and the rent was reduced to $1 per month; is that correct?

A. $1 minimum. I believe if you will check Richfield's records that you will find that was also—I had that $1 minimum on there, but I think though that was when things were getting so tough, and they cut that way back.

Q. Then an instrument dated February 29, 1944, in which your rent was increased to $100 a month?

A. That was $100 a month, and I was to pay one cent a [fol. 2478] gallon for all over 10,000 gallons.

Q. That instrument doesn't so state, does it?

A. Well, I know it doesn't so state, but I paid it.

Q. Then I will show you this one, dated March 21, 1944, which was a month later, and that does call for $100 a month and one cent a gallon over 10,000?

A. That's the one. I, however, paid that. I never had any time in '44 or '45 that I did have a flat rent. That was one of my chief troubles. I was trying to get a ceiling on my rent.

Mr. DeMartini: That is all.

Redirect examination.

By Mr. Alexander:

Q. Just one question. To whom did you pay this rent?

A. I sent it down to the Richfield Refinery. I always sent it in my mail by check. You see, I would pay $100 the first of the month. They billed me for rent $100 the first of the month, and by the tenth of the month they would send me a bill for the rent that I owed over the 10,000 gallons. The last few months I was in Richfield, I was paying them just about $300 a month. I was pumping about 30,000. I think the last month I was there I pumped 31,200.

The Court: How long had you been at that station?

The Witness: I opened it new in '42, and I went out in '46.

[fol. 2479] The Court: What was the gallonage when you opened it?

The Witness: My opening gallonage was approximately 18,000 a month, just a little better than 50,000 for the first quarter, and my business continued to go up until we had rationing, and with rationing, when that came we were put on a percentage of our average sales, and my first quota, I believe they cut us 15 per cent, and my gallonage was cut to 20,000, just around 20,000.

The Court: Then when that was taken off in 1945, you built the business up again?

The Witness: When rationing went off in '45, by busi-

ness immediately went up. I was pumping the last few months about 30,000.

The Court: So you built up quite a patronage?

The Witness: I had a very good business, a good clean business.

The Court: All right. Step down.

(Witness excused.)

The Court: I think, gentlemen, this is a good time to stop, so we will take a recess until 2:30.

(Whereupon at 12:25 o'clock p. m. a recess was taken until 2:30 o' clock p. m. of the same day.)

[fol. 2480] Los Angeles, California, Tuesday, May 22, 1951.
2:30 P.M.

The Court: All right, gentlemen, let us go on.

Mr. Somerville: The Government calls Mr. Schumunk.

Richard Schumunk, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. Richard Schumunk.

Direct examination.

By Mr. Somerville:

Q. Where do you reside, Mr. Schumunk?

The Witness: Pardon?

Q. Where do you live?

A. I live in Eugene, Oregon.

Q. And have you ever operated a service station under a lease from Richfield Oil Corporation?

A. Yes.

Q. And when did you first so operate a station?

A. Well, it was in Portland.

Mr. DeMartini: Will you speak louder Mr. Schumunk, please?

A. It was in Portland.

By Mr. Somerville:

Q. And what was the address, sir?
A. 12th and Sandy.
Q. At that time did you have a partner or did you have [fol. 2481] the lease in your own name?
A. I had a partner.

Mr. Somerville: May it be stipulated, counsel, that there is a 542 lease between Richfield and R. C. Schumunk and James R. Houle dated November 9, 1948?
Mr. DeMartini: On what?
Mr. Somerville: Covering the premises at 205 Northeast Sandy Boulevard in Portland.
Mr. DeMartini: Print date 1-47.
Mr. Somerville: Yes, sir.
Mr. DeMartini: On Form 542.
Mr. Somerville: May it be further stipulated, counsel, that the rental specified was $70. a month plus one cent over 7,000 gallons?
Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. Mr. Schumunk, at the time that you took over this station who did you talk to concerning taking over that station?
A. I first talked to Mr. Radke, the operator.
Q. What was the nature of your discussion?
A. Well, I was trading in there and I just——

Mr. Paradise: Mr. Schumunk, I am sorry. We can't hear you over here.
Mr. Somerville: Talk up, will you, please?

A. I was trading in there and I asked him if he would [fol. 2482] like to sell the station.
Q. Did you discuss the amount of inventory or stock that he would sell?
A. Not at the first time I talked to him. I did later.

Q. Did you subsequently discuss that?

A. Yes, I believe so.

Q. Did you subsequently purchase any stock of merchandise in connection with that station from Mr. Radke?

A. Yes, I purchased all of his stock.

Q. What was your inventory or how much did you invest in the station?

A. Well, I don't remember exactly but it was around $4,000, $4,500, something like that.

Q. Did you have any discussions with anyone concerning the products that you would handle or could handle?

A. I was told that we were to buy our——

Q. First of all, if you did have such a discussion, with whom and when?

A. With Mr. Graves, and I believe at the time that I purchased the station there was something said about where, and that we should buy our——

Q. And the discussions were at the station?

A. Yes, sir.

Q. Who was Mr. Graves?

A. Mr. Graves was the merchandiser.

Q. What was said?

[fol. 2483] A. Well, I don't remember exactly, but it was to imply that we were to buy all of our merchandise from their TBA setup and from Mr. Radke.

Q. Did Mr. Graves give you any instructions at that time concerning the products which you could or could not purchase from Mr. Radke?

A. No, not that I remember.

Q. Was anything said about whether or not you could handle products directly competitive to Richfield products?

A. Well, I believe so at the time that I checked in. I wouldn't say for sure. Either then or shortly after.

Q. Did you purchase only approved items?

A. Mostly. Once in a while——

Q. Have you ever purchased any competitive oils?

A. Yes, sir.

Q. And what were those oils?

A. Quaker State and I believe we had Pennzoil.

Q. Was there ever any incident that occurred concerning your handling that oil? Did you have any conversation?

A. Yes.

Q. With whom?

A. I believe Mr. Graves mentioned it several times.

Q. About when would this be?

A. I couldn't say for sure, but it was during the—it was not too long after we took the station over.

[fol. 2484] Q. And what did he say?

A. Well, he just wondered why we were not getting rid of the Quaker State oil that we had purchased from Mr. Radke at the time of the sale. He couldn't understand why it was not disappearing faster.

Q. And did you subsequently leave that station?

A. Pardon?

Q. And did you subsequently leave that station, terminate your lease?

A. Well, yes. I left there when they gave me 30 days notice to leave.

Q. That had something to do with Richfield losing its lease?

A. Yes.

Q. Will you tell us what your gallonage was during the whole period you were in the station?

A. When I started opening the station it was doing right around 9,000 gallons. At the time we sold out, it was doing eighteen.

Q. What rental did you pay during that period?

A. Well, the basic plus a cent a gallon.

Q. In other words, one cent a gallon?

A. Yes, above.

Q. Did you subsequently enter into another lease with the Richfield Oil Corporation on another service station?

[fol. 2485] A. Yes, sir.

Q. And where was that located, sir?

A. On 7th and Clair in Eugene.

Q. Did you operate that with a partner?

A. No, sir.

Mr. Somerville: May it be stipulated, counsel, that there is a service station lease on Form 542, print date 11-45, dated September 6, 1949, between Richfield Oil Corporation and R. C. Schumunk, containing a rental provision of $75.00 per month plus one cent per gallon in excess of 7,500

gallons, covering the premises at 900 West 7th Street, Eugene, Oregon?

Mr. DeMartini: So stipulated.

[fol. 2486] By Mr. Somerville:

Q. How much did you invest in this station, Mr. Schumunk?

A. $6500.

Q. Had there been a previous operator there?

A. No, sir.

Q. It was a new station?

A. Yes, sir.

Q. What was the nature of your investment in that station?

A. Stock and equipment.

Q. That would be TBA merchandise,——

A. TBA——

Q. ——oil, and the usual service station equipment?

A. Yes, sir.

Q. At that time with whom did you deal in the execution of this lease?

A. Leonard Case.

Q. Who is he?

A. The merchandiser.

Q. Did you have any discussion with him concerning the stock you should handle?

A. Yes.

Q. When did that occur, approximately?

A. At the time of the lease; at the time I leased the station.

[fol. 2487] Q. At the station?

A. Yes.

Q. What did he say, sir?

A. Well, he said, "Being a previous operator, why, you know that we buy our stuff from Commercial Supply, and they are our TBA distributor down here," and that was about all.

Q. Did you purchase TBA items from Commercial Supply?

A. Yes, sir.

Q. Did you handle any outside competitive products to those?

A. None other than oil.

Q. None other than oil?

A. Yes.

Q. What kind of oil did you handle, sir?

A. Quaker State and Pennzoil.

Q. Did you have any special reason for handling that?

A. Yes. I had for the Pennzoil, I had a trucking account that would use nothing but Pennzoil.

Q. Did you have any conversation with anyone in Richfield concerning your handling of that oil?

A. Yes, one morning when it was delivered——

Q. About when?

A. In the spring of——

Q. 1950?

[fol. 2488] A. Yes.

Q. At the station?

A. Yes.

Q. What was said?

A. In the morning they had delivered me five cases of oil, and it happened that Mr. Chapman and Mr. Case had dropped in, and Mr. Case came to me after they had left, and said that Mr. Chapman had asked him if he had seen this oil, and Mr. Case had said that he had thought it was for a trucking account that I had there, and he told Mr. Case to have me get rid of the oil.

Q. Who was Mr. Case and Mr. Chapman?

A. Mr. Chapman was the Richfield—I don't know—the merchandiser, head of the merchandising department, I believe, in Seattle. I am not sure of that. And Mr. Case is the merchandiser.

Q. Would you talk way over to this corner over here, Mr. Schmunk, so that counsel can hear you?

A. All right.

Q. Did you have any competitive suppliers call at your station? By "competitive suppliers" I mean people who were selling items that were competitive to items approved by Richfield?

A. Yes, I have.

Q. Did you purchase competitive items from these men?

[fol. 2489] A. Very seldom. The only time that I ever

did was if I was ordering parts, or something like that, that the supplier, TBA supplier, didn't handle. I might order an item, but that's all.

Q. Did they ever offer you a better deal pricewise?

A. Yes.

Q. What was your reason for not purchasing from them?

A. Well, because I couldn't take the chance.

Q. Now, was there ever any time that you were interested in handling a competitive line of tires?

A. Yes.

Q. Did you contact anybody, or did anybody contact you concerning them?

A. Yes.

Q. About when did this occur, sir?

A. It was in May, I believe.

Q. Are you talking about last year?

A. Yes, last year, '50. In May of '50.

Q. Would you describe with whom you had these conversations, and where?

A. It was the Gates Rubber Company, and it was at my station. The Gates Rubber Company representative, I should say.

Q. What was the discussion that you had at that time?

A. Well, he wanted to know if I would be interested in [fol. 2490] handling his tires, and he did offer me a very attractive deal. And being that I couldn't handle the tires, why, I suggested that he see my brother-in-law in Springfield.

Q. You were interested in the deal?

A. Yes, sir.

Q. But you didn't want to take a chance of getting in wrong?

A. That's right.

Q. Now, are you presently operating that station?

A. No, sir.

Q. Did you sell your inventory or your business to some succeeding operator?

A. Well, I didn't exactly sell it—or, I sold it, yes, but I didn't handle the deal myself.

Q. You left the station voluntarily, did you not?

A. Yes.

Q. Were you able to sell your total investment?

A. No.

Q. What was your gallonage during the period at the station? First of all, how long were you at the station?

A. I was at the station from September '49 to the first of October of '50.

Q. Could you give us some idea of what the gallonage was? How did it run during that period?

A. It started at around 10,000 gallons and dropped down [fol. 2491] to around five, and built back up to around 10,000 gallons previous to my decision to sell out.

Q. During this entire period did you pay a minimum rental of $70 a month?

A. Seventy-five.

Q. Seventy-five?

A. Yes.

Q. Plus one cent over?

A. Plus one cent over, yes.

Mr. Somerville: I think that is all.

Mr. Paradise: Over what?

By Mr. Somerville:

Q. On gasoline?

A. Pardon?

Q. That was on gasoline?

A. I paid one cent a gallon above the seventy-five minimum on gasoline.

Mr. Somerville: That is all.

Cross-examination.

By Mr. DeMartini:

Q. The rent at the first station at 12th and Sandy was $70, plus one cent over 7,000, was it not?

A. That's right.

Q. And the rent at the second station was $75, plus one cent over 7500?

[fol. 2492] A. That's right.

Q. Making a cent a gallon in each instance, isn't that correct, provided it should reach that?

A. That's right.

Mr. DeMartini: I think that is all, Mr. Schmunk.
The Court: Step down.

(Witness excused.)

The Court: Call your next witness.
Mr. Somerville: Mr. Davis.

JOSEPH DAVIS, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: Joseph Davis.
The Clerk: Joseph Davis. D-a-v-i-s?
The Witness: Yes, sir.

Direct examination.

By Mr. Somerville:

Q. Mr. Davis, where do you reside?
A. In Boise, Idaho.
Q. What is your present occupation or business?
A. Field engineer for the Gates Rubber Company.

Mr. Paradise: For what?
[fol. 2493] The Witness: Field engineer for the Gates Rubber Company.

By Mr. Somerville:

Q. Have you had any other positions with Gates Rubber Company?
A. Yes. I was tire market extension man for them from May, 1950, until September, 1950.
Q. Is Gates Rubber Company a manufacturer of certain automotive products that are sold to service stations?
A. Yes, sir.
Q. What are those products?
A. Oh, tires and tubes, and camel-back fan belts, and various rubber products.

Mr. Paradise: Will you speak a little louder, please, Mr. Davis? We have trouble hearing you.

The Witness: Sorry.

By Mr. Somerville:

Q. As tire market extension man, was it a part of your duties to call on service stations?

A. Yes, sir.

Q. For what purpose?

A. For creating new accounts, new sales outlets.

Q. Creating new accounts. Now, with respect to those new accounts, what particular Gates products were you attempting to sell?

A. Tires, tubes, and batteries.

Q. What was the particular area assigned to you?

[fol. 2494] A. The entire states of Oregon and Washington.

Q. Do you know where the Gates tires and tubes are manufactured?

A. In Denver, Colorado.

Q. Did you also attempt to sell batteries?

A. Yes, sir.

Q. Where were they manufactured?

A. I do not know. That was a made product.

Q. Did you ever attempt to set up a new account at a service station operated by a Mr. Rex Boyland at 1810 South Broadway in Portland?

A. Yes, sir.

Mr. Somerville: May it be stipulated, counsel, this is an L-O unit?

Mr. Paradise: Yes. And was at the time of this discussion?

Mr. Somerville: Yes.

Mr. Paradise: Yes, so stipulated.

By Mr. Somerville:

Q. Now, what were the circumstances under which you made any sales call at this station?

A. It was through an inquiry. We had a direct mail advertising plan, to which they had responded, and on which, in turn, I had made the call.

Q. About when did you call on this station?

A. In May, 1950.

[fol. 2495] Q. Did you have any discussions with Mr. Boyland concerning the Gates line of tires?

A. Yes, sir. We discussed it and created a desire to buy. The situation came up where we would put signs on the building, or at least display our merchandise there in an effort towards creating a desire to sell. So it was brought out that he could not do that, and that he would have to keep them under cover.

[fol. 2496] Q. And did you create a new account there for Gates?

A. No, sir, we would not.

Q. Calling your attention to a service station operated by John E. Larson at 1010 Northeast Sandy Boulevard in Portland, Oregon, do you recall this station?

A. Yes. That was another answer to a direct mail advertising.

Q. Did you personally call on Mr. Larson?

A. Yes, sir.

Q. When did that occur?

A. That, I believe, was also in the fifties.

Q. Did you have a conversation with him concerning his taking the Gates line?

A. We had a conversation and it led to the same thing, so which we decided to the mutual interest of both parties not to handle Gates tires.

Mr. Paradise: Could we have the same stipulation concerning Mr. Larson?

Mr. Somerville: Yes. I am sorry, Mr. Paradise.

Mr. Paradise: That Mr. Larson was an L-O operator?

Mr. Somerville: And was at that time.

Mr. Paradise: Yes, thank you.

By Mr. Somerville:

Q. Do you know a Mr. Richard Schmunk?

A. Yes, sir.

[fol. 2497] Q. The witness who was on the stand a minute ago?

A. Yes, sir.

Q. Did you ever call at his station?

A. I first called on him in May to obtain a service on my automobile, at which time we created a little sales conversation on the Gates products.

Q. What station was that

A. That was in Eugene.

Q. What transpired at that time that you called on him?

A. Well, I believe we——

Q. Did you fix the time? I do not recall. Did you fix the time of this particular instance?

A. It was along in May.

Q. Yes.

A. When I first went for the company on the entire market extension. It was just a matter of conversation. He had shown a little interest in buying. However, he brought out the fact he could not display the merchandise, but thought he might be able to handle it through his brother-in-law, Mr. Knecht in Springfield, Oregon, which later I sold to Mr. Knecht.

Q. Did you say it was his brother-in-law?

A. His brother-in-law.

Q. Was he operating a service station?

[fol. 2498] A. He operates the Knecht Tire and Oil Company in Springfield.

Q. But you have not led up to an account at that Eugene station operated by Mr. Schumunk.

A. No, sir.

Mr. Somerville: I think that will be all. Oh, it may be stipulated, counsel, that this was an L-O unit at the time of this particular incident.

Mr. Paradise: So stipulated. No questions.

Mr. Somerville: The Government calls its next witness Mr. Carlson.

FRED CARLSON, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: Fred Carlson.

Direct examination.

By Mr. Somerville:

Q. Mr. Carlson, where do you live?
A. I live in Eugene, Oregon.
Q. Eugene, Oregon. It is a nice place to live. Would you tell us what business you are in?
A. Well, I am in the wholesale automobile parts and equipment business. We deal primarily in parts, equipment, accessories.
[fol. 2499] Q. What is the name of the company?
A. Carlson & Hatton Co.
Q. Does your company deal in the usual automotive accessories that are sold to service station outlets?
A. With the exception of what you might call chrome appliances.
Q. What is the sales area in which your company operates?
A. Well, roughly, Eugene is in the center of the Willamette Valley and we cover from Eugene east to the Cascade Mountains, which is a natural division point, we cover west to the Pacific Ocean, which is also a natural point, we cover south approximately to a few miles north of Roseburg, where competition sets in, and likewise north almost to Salem, which makes an area roughly 150 miles by 80 to 90 miles.
Q. And you attempt to sell to service station outlets?
A. We attempt to sell to service station outlets, yes.
Q. Have you attempted to sell those outlets bearing the Richfield colors?
A. We have attempted to sell them.
Q. Going back to the products which your company handles, we are interested in where you get them from. Does your company handle tires and tubes?
A. We do not.
Q. Batteries?

[fol. 2500] A. Yes.

Q. What brand of batteries?

A. We handle States batteries, of which our particular division is made in Portland.

Q. Do you handle fan belts?

A. We have handled Gates.

Q. Where do you receive your shipments?

A. Those come out of the Wiggins warehouse in Portland.

Q. Do you know where they are manufactured?

A. Yes, Denver, Colorado.

Q. Have you ever handled any other line of fan belts?

A. Yes, Durkee-Atwood. They are manufactured in Minneapolis.

Q. Do you receive your shipments from Minneapolis?

A. Yes.

Q. Have you ever handled radiator hose?

A. The same places, both.

Q. What about oil filters?

A. We handle Fram oil filters and those we get out of Bingham City, Utah or Rhode Island, Providence.

Q. Battery cables is another item.

A. Well, we handle Packard cables and also Crescent cable. Packard we get either from Portland or from the factory, and Crescent we get direct from the factory, which I believe is in New Hampshire or some place around there.

[fol. 2501] Q. Does your company handle spark plugs?

A. Yes.

Q. What brands of spark plugs?

A. We handle Auto-Lite, A-C and Champion.

Q. From what source do you get those?

A. And we buy those from Trost & Co. in Portland, the Auto-Lite plugs, the Champion plugs we buy from Blue & Wright in Portland, and the A-C we buy from—there are three sources all of which are in Portland.

Q. Do you handle mufflers and tail pipes?

A. Yes, we handle Maramont automotive products, makers of mufflers and pipes, and they are made in Chicago and we buy them direct.

Q. Do you receive your shipments from there?

A. Yes. We warehouse for the area.

Q. Do you also handle chemicals, lines of polishes and waxes?

A. We handle duPont chemicals.

Q. Where do you get those?

A. Well, those come out of California. They are warehoused in California.

Q. And you receive your shipments from there. Do you maintain a stock of these items?

A. Yes, sir.

Q. What determines the amount of stock that you have on [fol. 2502] hand?

A. The amount of turnover.

Q. The monthly turnover, did you say?

A. Yes, the amount of dollars and cents turnover. We try to reach a monthly or a yearly turnover of four times our investment.

Q. Does that have any connection with the orders that you receive?

A. Yes. Of course, in our business freight is quite an item and we have to meet freight rates. In other words, there are minimum freight shipments of 100 or 150 or 200 pounds specified by the manufacturer, and we buy those products and in order to have the freight laid in we must buy their specific quantities.

Q. Are you generally successful in selling Richfield outlets?

Mr. Paradise: I object to that for lack of foundation.

The Court: It is a preliminary question. Go ahead.

The Witness: Can I answer the question?

The Court: No.

By Mr. Somerville:

Q. Have you ever called upon a service station operator by the name of Elmer Wick? Do you know that gentleman?

A. Yes, I know Elmer.

[fol. 2503] Q. Does he operate a service station handling Richfield gasoline?

A. He operates—well, he has operated two Richfield stations. He is operating one now, I think, on Sixth Street

in Eugene. He did operate one when I was calling on him, on a trouble call on him, at 11th and Pearl. Prior to that time he had operated a Shell service station.

Mr. Somerville: May it be stipulated, counsel, that both of the Richfield stations referred to are L-O units and have been during the whole period involved here?

Mr. Paradise: All right, so stipulated.

By Mr. Somerville:

Q. Did you sell Mr. Wick anything while he was operating a Shell station?

A. Yes. I——

Mr. Paradise: Objected to as immaterial.

Mr. Somerville: It is preliminary.

The Court: All right.

Mr. Somerville: I think it has a direct bearing.

A. I would say that Elmer Wick, when he was in the Shell service station, was one of our most valuable service station accounts, and that his account very rarely ran under $150 per month average, which is good for a service station operator.

Q. How far away was the Richfield station he subsequently operated?

[fol. 2504] A. The Shell station was one block away from our firm and the Richfield station was one block farther away than that, or two blocks total distance.

Q. Did you subsequently sell Mr. Wick any of your merchandise as a Richfield dealer?

A. We found from a period of tapering off—he went in, I believe, in January 1949 or thereabouts, and in the space of three or four months we were down from selling him $125 to $150 monthly, down to an average of $4 to $10 per month.

Q. Was there anything noticed concerning the type of items that he purchased in the beginning and later on?

A. Well, do you mean when he was in Shell as against when he was in Richfield?

Q. Yes, if there is any distinction.

A. Well, when he was in Shell we were able to put in a stock of merchandise.

Mr. Paradise: I object to any testimony concerning what was sold to the man while he was in the Shell station. The question of relationship between the man and Shell Company is not an issue.

The Court: Yes, I will sustain the objection.

A. Well, I will answer it this way: We were unable to put in a stock of merchandise when he was in the Richfield station. The products he bought there were primarily trouble items. If a condenser went wrong and he didn't [fol. 2505] have it in stock, he would run up and get the condenser. If there was some item of importance needed, a water pump, he would come up and buy the water pump. But it was one item, one thing at a time. We were not able to put in any complete stock of merchandise which would make it possible for us to merchandise to him in a more profitable manner for us and also give him a stock of merchandise that he could merchandise to his customer in a more profitable manner to him.

Q. Did you call on him with respect to the sharp drop in your sales?

A. Well, it was called to my attention mainly through checking my salesmen's reports. I noticed the quite considerable drop, naturally. I called the salesman and asked him about it and, of course, I knew what the drop would be. I anticipated it.

Q. Then did you subsequently call on Mr. Wick?

A. Yes, I called on Mr. Wick and took the opportunity one day to go over and talk to him.

Q. When would this be?

A. This was in the spring, because I was with a representative of Hinson Manufacturing Co. who make seat covers.

Q. Of what year?

A. This would be '49, I believe.

Q. Did you say anything to him concerning his not buy- [fol. 2506] ing?

A. Well, I asked him, "Elmer, "you can't have a customer that does a lot of business without being quite friendly to you. I originally asked him if he found any fault with our service or with our materials. And he said, "No." I asked him if business was good and he said, "Yes, busi-

ness was pretty good." We went into the discussion at that time about seat covers. He was quite interested in the assortment. It had eye appeal, it was a good value, it had a good rack. It was a piece of merchandise that could be sold. And he was quite interested in it, but he bluntly come out and told me that, while he would like to very much, he could not buy it.

Q. Did he say why he could not buy it?

A. Well, he said—and these are his words as he gave them to me, and I had asked him why it should make so much difference, because he was a good operator and I was leading up to get some information——

Mr. Paradise: Well, I object to the comments. Just the conversation, please.

A. All right, sir. What I am trying to get at is, he had said—he had been such a good operator in the past, that as soon as he was able to show Richfield Corporation that he could bring up the gas volume in that station, he was satisfied that they would leave him alone.

[fol. 2507] By Mr. Somerville:

Q. Have you at any time since that time been able to sell Mr. Wick any volume of merchandise other than these trouble items you referred to?

A. Elmer, since that time we have not been able to sell him too much. He has since—well, it is immaterial to the case.

Mr. Somerville: I think that will be all.

Mr. Paradise: No questions.

The Court: All right, step down.

Mr. Somerville: The Government calls Mr. Pearse.

Richard K. Pearse, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Richard K. Pearse.

Direct examination.

By Mr. Somerville:

Q. Mr. Pearse, where is your residence?

A. Portland, Oregon.

Q. Are you in business there?

A. Yes, I am a salesman for Peck Bros. Automotive Products.

Q. What type of automotive products that are ordinarily sold to service stations are handled by your company?

A. Well, tires, batteries, tools, filters, filter elements, and [fol. 2508] other allied lines that belong with them.

Q. Are you familiar with the source of the products that are handled by Peck Bros.?

A. Yes, sir.

Q. What brand of tires do you handle?

A. We handle two lines of tires, Pennsylvania tires and Armstrong tires.

Q. Where are the Pennsylvania tires manufactured?

A. Jeanette, Pennsylvania.

Q. How do you receive shipments?

A. Well, we receive shipment by box cars. Is that the way you mean?

Q. Yes. Where do they come from?

A. They come from the Jeanette plant in Pennsylvania.

Q. Do you maintain a warehouse?

A. We maintain a warehouse for Pennsylvania.

Q. In Pennsylvania?

A. We maintain a warehouse for the Pennsylvania Rubber Co.

Q. Oh. Where do you get the Armstrong tires?

A. From Westhaven, Connecticut and Natchez, Mississippi, and Akron, Ohio.

Q. Do they come in the same manner?

A. In the same manner.

Q. What brand of batteries do you handle and where [fol. 2509] do you receive them from?

A. We handle Willard batteries. Most of them come from Portland, Oregon, some come from the Los Angeles plant, and some from the Cleveland plant. It depends upon the type of battery that we order. We warehouse.

Q. You also maintain those in your warehouse?
A. Right.
Q. What brand of oil filters do you handle?
A. Winslow oil filters.
Q. Where do you receive shipments from?
A. Oakland, California, and we warehouse those, too.
Q. Do you handle anti-freeze?
A. Yes, we handle the Peak and One-Way anti-freeze.
Q. Where do you receive those products from?
A. Well, we receive them from the Chemical Solvents, which is where it is manufactured. I don't know. Somewhere back there.
[fol. 2510] Q. Outside of the state of Oregon?
A. That's right.
Q. What is the manner in which you receive shipments of those products?
A. The anti-freeze?
Q. Yes, sir.
A. Well, our big shipment comes to Portland, but we have stop-off points in Eugene and Medford, and our other warehouses, where we ship a partial car and drop a certain number of cases and barrels of anti-freeze at each one of those warehouses.
Q. How many salesmen does your company employ?
A. Eight wholesale salesmen.
Q. Are some of these salesmen located at different spots through Oregon and Washington?
A. Yes, sir.
Q. Are these shipments directed to these salesmen of your company in their particular area?
A. Yes, they are, and their particular warehouse. They maintain a warehouse in the town they are located in.
Q. For the purpose of supplying their customers?
A. Yes.
Q. What is the general sales area that your company sells its products in?
A. The whole state of Oregon, and southwestern Washington.
[fol. 2511] Q. How long have you been a salesman with the company?
A. Eight years.
Q. What is your sales area?

A. I cover up the Columbia River Highway as far as Biggs Junction, back through Moffett, back to Portland, and in Washington I go as far as Goldendale. Then I have all the surrounding territory of Portland.

Q. Now, one more question, concerning the moving of your merchandise, do you know what the warehouse inventory is, that is, how big a stock you maintain on hand?

A. Well, actually, I couldn't answer that, but I know that——

Q. Do you know what determines the amount that you will have on hand?

A. The amount of turnover, the amount of sales per month.

Q. Now, with respect to the particular area in which you attempt to make sales of these products, do you also attempt to make sales at service station outlets?

A. Right. Service stations and garages, both.

Q. Have you ever called on a service station operated by James Bradstreet in Goldendale, Washington?

A. Yes, sir.

Q. What brand of gasoline does he have?

A. Richfield.

[fol. 2512] Mr. Somerville: May it be stipulated that this is a leased out station, counsel?

Mr. Paradise: Yes.

Mr. Somerville: When this occurred?

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. Now, have you sold Mr. Bradstreet any of your products?

A. Yes, I sold him Armstrong tires.

Q. Can you tell us the period in which you have been making these sales?

A. Oh, he has been getting our tires for a period of two years. We sold him on the grade, that it was a better tire, and it had a better guarantee than Goodyear, and he granted that it did, because he had trouble in getting adjustments on the Goodyear tires.

Q. Did you experience any period in which he did not buy your tires?

A. Well, I almost did because—but at that time, why, Mr. Bradstreet——

Q. At what time?

A. Oh, it has been about, oh, four or five months ago, or something in that area. He came to me when I called on him and said to me, "I am going to have to quit handling your tires, because Mr. Crawford, our distributor, told me if I didn't quit handling them, they were going to kick me [fol. 2513] out."

Mr. Paradise: I object to that as hearsay. He can testify to what he talked about with a Richfield employee, but the TBA distributor, without any showing of agency or authority,——

By Mr. Somerville:

Q. Are you relating a conversation between you and Mr. Bradstreet?

A. Yes. Mr. Bradstreet told me that.

Mr. Paradise: Who is Mr. Bradstreet?

The Witness: He is the Richfield operator of the service station.

By Mr. Somerville:

Q. So did you—go ahead.

A. So he wanted to know if there was anything I could do about it. So, of course, I turned that information over to my boss, Mr. Peck, and from there I don't know where it went, but I know I still continued to sell him tires, although the tires at the time, from then on, had to be put—be obscured. In other words, he couldn't display them like he had normally displayed them before.

Q. Did he advertise them?

A. No, he couldn't put a sign up at all.

Q. Could you see them when you came by the station?

A. No.

Q. Now, do you remember ever calling on a Mr. James Ocheltree?

[fol. 2514] A. Yes.

Q. Did he operate a service station handling Richfield gasoline?

A. Yes.
Q. Where was that located?
A. Hood River, Oregon.

Mr. Somerville: May it be stipulated, counsel, that this was an L-O station?
Mr. Paradise: An L-O station on Form 542?
Mr. Somerville: Yes, sir.
Mr. DeMartini: And was at the time?
Mr. Somerville: And was at the time.
Mr. Paradise: So stipulated.
Mr. Somerville: So far as I know.

By Mr. Somerville:

Q. Are you familiar with whether you made sales to Mr. Ocheltree?
A. Yes, I made sales to him up to the time that he was put out. I sold Winslow filters, and Willard cables, and practically all of the products we handle.
Q. Did he display these Winslow oil filters?
A. No, they had to be sold under the counter.
Q. Wait a minute. Don't jump ahead. How do you know they had to be? Did you have any conversations with him?
A. Yes. He said he couldn't put them up above because they weren't Richfield approved. He had to have Puralator.
[fol. 2515] Q. When did this conversation occur?
A. Oh, shortly after I had sold him on my Winslow filters. I asked him if he wouldn't display them, and he told me at the time that he couldn't.

Mr. Somerville: I think that is all, counsel.
Mr. DeMartini: No questions.
The Court: Step down.

(Witness excused.)

John Brewington, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?
The Witness: John Brewington.

The Clerk: Spell that, please.
The Witness: B-r-e-w-i-n-g-t-o-n.

By Mr. Somerville:

Q. Mr. Brewington, what part of the country do you hail from?
A. Portland, Oregon.
Q. What business are you in?
A. I am now in the automotive business. I was a salesman for Peck Brothers.
[fol. 2516] Q. Is that the same company concerning which Mr. Pearse just testified?
A. Yes, sir.
Q. How long were you with Peck Brothers?
A. Fourteen months; thirteen, fourteen months.
Q. During this period did you endeavor to make sales to service station outlets?
A. Service stations, garages, and dealers were my accounts, yes, sir.
Q. Did you make some efforts to sell service stations handling Richfield gasoline and using Richfield colors?
A. Yes, sir.
Q. Do you recall a service station operated by Mr. Eppard, at 6005 North Albina, in Portland?
A. I do.

Mr. Somerville: May it be stipulated that this is a leased out station, counsel?
Mr. Paradise: Yes.
Mr. Somerville: And was during the period this witness is testifying to?
Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. Do you remember when you began calling on Mr. Eppard?
A. Well, it was October, I believe, '49; somewhere around in there.
[fol. 2517] Q. Were you successful in your sales efforts at that time?
A. Only on some items.

Q. What items were those?

A. Winslow filters, a few battery cables, and a periodic battery whenever he needed it.

Q. Did he say anything with respect to—did he display those items?

A. He did not.

Q. Did he say anything with respect to the reason for not displaying them?

A. He said that—he told me he could not display them because he was a dealer for Richfield, and they didn't want him to handle other products other than Richfield products.

Q. Did he say anything with respect to whether he could handle those products at all?

A. Well, it was his own choice to handle them, but he couldn't handle them.

Would you phrase that again, sir?

Q. I was just referring to conversations that you had, and I wanted to be sure I had the full conversation.

A. He told me that he could not display my merchandise because they were not company approved by Richfield.

Q. Did he say anything with respect to his credit card [fol. 2518] privileges?

A. Yes, he was called upon by a Richfield representative——

Mr. Paradise: The question is——

By Mr. Somerville:

Q. That is what he told you?

A. Yes.

Q. O.K. Go ahead.

A. And there was some conversation about my products being in the station, so when I came around the next time I asked him why they were not displayed, and why my signs weren't up there merchandising my products, and he told me that he could not display them because Richfield would not let him.

Q. Did you ever have any discussions concerning the prices on items you had for sale?

A. Oh, yes.

Q. Was Mr. Eppard interested in your price?

A. Yes.

Q. When did these discussions occur?

A. Well, some of my prices—in other words, items are sold in deals. Some of my prices he wanted, but he could not handle them because of company policy.

Q. Did you ever see any of your products displayed in that station?

A. I did not.

Q. Did you ever sell him very many products?

A. Yes, I did periodically, in small quantities, one, two, [fol. 2519] or——

Q. Were those items that were competitive—I mean other than the Winslow oil filters—items that were competitive with items approved by Richfield?

A. Yes, sir.

Q. Did you ever call on a service station operator by the name of Mr. Sig Hanson at 4871 North Lombard, in Portland?

A. I did.

Q. When did you call on this station?

A. About the same time, in '49; in October '49.

Mr. Somerville: May it be stipulated this is a leased out station?

Mr. Paradise: Mr. Hanson was operating a leased out station?

Mr. Somerville: Yes.

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. At the time you called on this, was it a new station or an old station?

A. It was a new station.

Q. That was the first time that you had ever talked to Mr. Hanson, at the time he opened the station?

A. That's right, sir.

Q. Did you make an effort to sell him on your products?

A. I did.

[fol. 2520] Q. Was there any conversation concerning his ability to handle your products?

A. Yes.

Q. What was said?

A. Well, Mr. Hanson told me that he could not handle my products because he was held by the Richfield policy with their TBA set-up.

Q. Did you ever sell any of your products to Mr. Hanson?

A. Yes.

Q. Specifically what?

A. I sold him tires, Armstrong tires.

Q. Did he display your tires?

A. No.

Q. Did you deliver them to his station?

A. Yes.

Q. Did he ever give you any instructions concerning delivery of those tires?

A. No.

Q. Would those sales be during periods when Goodyear tires were available, do you know?

A. I could not sell him my tires when he had a complete stock of Goodyear tires, but when he could not get tires, that is the only time I could sell him tires.

Q. Was that at his station?

[fol. 2521] A. Yes, sir.

Q. Do you recall a service station operated by a Mr. Pickler?

A. Yes, sir.

Q. Where is that located?

A. That is up on Willamette Boulevard.

Q. In Portland?

A. Yes.

Mr. Somerville: May it be stipulated this station operated by Mr. Pickler is a leased out unit, and was during this whole period involved?

Mr. Paradise: Yes. Leased out by Richfield to Mr. Pickler?

Mr. Somerville: Yes.

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. When did you call on this station?

A. October, 1949.

Q. Were you successful in selling him any of your products?

A. Yes.

Q. What products did you sell?

A. I sold him tires, batteries, filters, cables, and so forth.

Q. Did Mr. Pickler display these items?

[fol. 2522] A. No.

Q. Did you ever have any conversation with him concerning the display of these items in connection with making a sale?

A. Yes.

Q. About when? Do you recall the specific time?

A. About November, or about a month after I at first sold him on my items.

Q. In Portland, Oregon?

A. Yes.

Q. What did he say? This occurred at the station, I presume?

A. Yes. I asked him why he didn't display my items, and he told me he could not put up signs or merchandise my products, that he had to conceal them in order to handle them.

Q. Did you ever notice where he concealed them? Did he ever tell you where he concealed them?

A. Yes. They were concealed in the upper part of the ladies' restroom.

Q. Do you ever recall calling on a service station operated by F. Milton Boyer on Northeast Lombard and Alberta, in Portland?

A. Yes, sir.

Q. When did you call on that station?

[fol. 2523] A. About the same time as the others, October, '49.

Q. Did you sell him anything?

A. I did not.

Q. Did you explain your prices, what your prices were, and what products you had to sell?

A. I explained them to him, yes.

Q. Did he indicate any interest in the products?

A. Yes, he did indicate interest.

Mr. Paradise: Will it also be stipulated that Mr. Boyer was an L-O operator on Form 542?

Mr. Somerville: Yes, sir.

Mr. Paradise: Thank you.

By Mr. Somerville:

Q. Did he say anything with respect to whether he could handle these products?

A. Yes, he said he could not handle the products, my products.

Q. And you have never sold him anything?

A. I have never sold him anything.

Q. Do you recall a service station operated by Warren D. Chandler?

A. I do.

Q. Where is that located?

A. 21st and Northeast Broadway.

Mr. Somerville: May it be stipulated that this was an L-O station at this particular time?

[fol. 2524] Mr. Paradise: Yes. Is it stipulated these are on the same 24-hour Form 542 lease?

Mr. Somerville: It is a Form 542 lease. I can't stipulate whether it was the old form or the new form, counsel.

Mr. Paradise: Well, if you cannot so stipulate, I think we had best put in the particular instrument in each case.

Mr. Somerville: Possibly so.

(Conference between counsel.)

Mr. Somerville: We stipulate that this Form 542 has a 24-hour clause.

Mr. Paradise: I think perhaps for the purpose of the record the stipulation between the parties which is on file as Defendant's Exhibit A does contain a stipulation that all of these 542 forms which have been entered into subsequent to 1941 do contain the 24-hour clause, and that all those that were in existence prior to that time had been amended to the 24-hour clause. Am I correct?

Mr. Somerville: I will stipulate that is correct.

Mr. Paradise: Thank you.

By Mr. Somerville:

Q. Did you ever sell any of your products to Mr. Chandler?

A. No, only small items, a few dollars and cents.

Q. Were those items that were competitive to Richfield approved products?

A. The same brands.

[fol. 2525] Q. What do you mean, the same brands? Give us an illustration, if you will?

A. Valve core caps are made by Schrader or Dill.

Q. Are you familiar with what brands are approved by Richfield?

A. I believe Dill is.

Q. So they were the same items?

A. They were.

Q. Did you have any discussion with Mr. Chandler concerning whether or not he could handle your products?

A. I did.

Q. When did that occur?

A. When he took over the new unit.

Q. And that was at his station?

A. Yes.

Q. What did he say to you?

A. Well, he—Mr. Chandler told me that he could not buy my products because he was forced to handle the Richfield line of merchandise.

Q. Had you been selling your products to Mr. Chandler prior to his operating this station?

A. Yes.

Q. He was familiar with them, then?

A. Yes.

Q. Did he ever indicate any dissatisfaction with them?

[fol. 2526] A. No.

Q. Did any of these men that you have testified to indicate any dissatisfaction in connection with your sales attempts of your products?

A. No.

Mr. Somerville: That is all. You may take the witness.

Mr. Paradise: No questions.

The Court: All right, step down.

(Witness excused.)

The Court: Let's have a short recess.

(A short recess was taken.)

[fol. 2527] The Court: All right.
Mr. Somerville: Mr. McMullin for the Government.

CLAYTON D. McMULLIN, called as a witness for the plaintiff, being forst sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: Clayton D. McMullin.

Direct examination.

By Mr. Somerville:

Q. What is your name, sir?
A. Clayton D. McMullin.
Q. Where do you live?
A. I live in Sacramento, California.
Q. Are you in business there?
A. Well, I am a sales representative of the Quaker State Oil Refining Co. of California.
Q. Is that the manufacturing company manufacturing Quaker State oil, lubricating oils and greases?
A. It is a subsidiary of the mother company. The California company is a subsidiary of the Quaker State Oil Refining Corporation.
Q. How long have you held this position, Mr. McMullin?
A. 14 years.
Q. Where do you receive your shipments of Quaker State oils and greases?
[fol. 2528] A. In Sacramento, California.
Q. That is, where do you place your orders for them?
A. We place them through to the Los Angeles office, through Oil City, Pennsylvania.
Q. Do you maintain a stock of oil and greases in Sacramento?
A. We do.
Q. What determines the amount you have on hand?
A. Well, seasonal sales. We determine our order by the time of the year. In other words, our sales, we control our orders as we project our ordering over a period of

three months, because of the fact that it comes around by water and it takes approximately three months from the time we place our orders until that order arrives in Sacramento. We base our ordering on previous sales.

Q. How often are you receiving shipments, approximately?

A. Well, they will average one car load a week at least, more, more than average a car a week in Sacramento proper.

Q. What particular area do you supply?

A. Direct operations out of Sacramento, the area is 150 miles long and 100 miles wide, making our operations headquarters in Sacramento.

Q. Are you familiar with the Richfield brands of lubricating oils and greases?

[fol. 2529] A. Yes, I am.

Q. I am speaking now competitively. Are their products comparable to those oils and greases?

A. In quality, yes, sir.

Q. And the grades?

A. Yes, sir.

Q. Do you sell service station accounts?

A. Yes, we do.

Q. Calling your attention to a service station operated by a Mr. Ben Oliver at 700 Texas Street, Fairfield, California, are you familiar with that particular dealer or operator?

A. Yes, I am, or, rather, I was.

Q. Have you ever made any sales of Quaker State to this man?

A. Yes, I have.

Mr. Somerville: May it be stipulated, counsel, that this particular unit was an L-O unit during that period?

Mr. Paradise: So stipulated.

Mr. DeMartini: Will you fix the time, please?

By Mr. Somerville:

Q. Will you place the time that you were making sales of these products?

A. As near as I can remember it, it was in the fall of '46 and the spring of '47.

Mr. Paradise: It is also stipulated that Mr. Oliver was the L-O operator of that unit.

[fol. 2530] Mr. Somerville: Yes.

Q. Was Mr. Oliver a good account of yours?

A. Yes, he was.

Q. At any time did he cease purchasing your oils?

A. Yes.

Q. About when did that occur?

A. In the early part of '47.

[fol. 2531] Q. Did you have any conversation with him concerning his not buying any more oil from your company?

A. Yes, I did.

Q. Where did that occur?

A. At his place of business in Fairfield.

Q. What was the time, now?

A. That was around the first of the year, in '47. I am not quite sure of the exact date.

Q. Were any other parties present at that time?

A. Not as I recall, no.

Q. Did you say anything to Mr. Oliver concerning his not buying any of your products?

A. I asked him why.

Q. What did he say?

A. I asked him if there was any reason, anything that we had done to force him to discontinue his business with us. Naturally, we were very much interested in those points. In fact, he said, "No, no, not at all." As a matter of fact, that he would like very much to continue with the Quaker State Oil, but Mr. Harris, who was the commission agent in Fairfield, where he was at that time, had called on him to take it out, not only discontinue handling it, but take out what he had in there at that time, and not take any more, or his lease would be broken.

Q. Thereafter did you make any more sales to that man?

[fol. 2532] A. No.

Q. Did you ever call on a service station operated by a George Foltz in Orland, California?

A. Yes.

Q. Have you sold him Quaker State products?

A. Yes.

Q. You have sold him?

A. Yes.

Q. Do you know in what period you were selling this man?

A. It was just about the same time, I think in the last three months, or the last half of '46, as I recall.

Q. At that particular outlet, in connection with Mr. Foltz, did you have any period when he discontinued buying your products?

A. Yes.

Q. When did that occur?

A. At about the same time as Mr. Oliver, the first part of '47.

Q. Did you contact Mr. Foltz regarding that?

A. Yes, sir.

Q. At his place of business?

A. Yes, sir.

Q. And what did he say?

Mr. Paradise: May we have a stipulation, counsel, con-[fol. 2533] cerning Mr. Foltz and the nature of the outlet?

Mr. Somerville: Yes. Mr. Foltz operated an L-O station at this particular time.

Mr. Paradise: Yes, so stipulated.

The Witness: Well, it was very nearly the same as I got from Mr. Ben Oliver, that he was told by the commission agent in Orland to discontinue the sales of Quaker State oil, or they would break the lease.

By Mr. Somerville:

Q. Then did you sell him any more oil?

A. No.

Q. Did you subsequently call at this station at a time when there was a new operator?

A. Yes.

Q. What was the name of that operator?

A. Reese.

Q. Walter L. Reese?

A. Reese, yes, that's it.

Mr. Somerville: May it be stipulated, counsel, that Mr. Reese was a Form 542 L-O operator that followed Mr. Foltz?

Mr. DeMartini: He was at the same station?

Mr, Somerville: At the same station.
Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. Approximately when did you call on Mr. Reese?
[fol. 2534] A. That was shortly after. He took over the same unit that Mr. Foltz gave up. That was in the first part of '47.

Q. Were you able to sell Mr. Reese anything?

A. Yes, we were.

Q. Did that continue all during the period that he was operating that station?

A. No. I imagine that we sold him over a period of three months.

Q. Did he discontinue?

A. He discontinued under the same conditions as Mr. George Foltz did, because the pressure was put on by the Richfield Oil commission agent, and he was forced to discontinue the sale of Quaker State.

Q. By the way, did he display the oil at the time he was buying from you?

A. No, he did not.

Q. And Mr. Foltz displayed the oil?

A. I think he attempted to. As I recall, he put some on the shelf in the station, but he was called on doing that, and he definitely put——

Q. Now, you are talking about a conversation,—did you have some conversation with him?

A. Yes, I did.

[fol. 2535] Q. At his station?

A. Yes.

Q. About when would that be?

A. The first part of '47.

Q. What did he say about the display?

A. He displayed the oil, and the commission agent told him he could not handle it any more, and he then put it under the counter, and the agent discovered it there, and that was the beginning of the end of his lease with Quaker—I mean with Richfield Oil Company.

Q. What do you call the signs you refer to?

A. We have several types of signs. The most popular is a curb sign.
Q. Did any of these men display a curb sign?
A. No, they didn't.
Q. Did you offer to supply them with some?
A. Oh, yes, very happy to.
Q. Is that a part of your usual approach?
A. Oh, yes.
Q. And all of them declined to take the signs?
A. Yes.

Mr. Somerville: That will be all.
Mr. DeMartini: No questions.
The Court: Step down.

(Witness excused.)

[fol. 2536] Mr. Somerville: The government calls Mr. Hurd.

James Hurd, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination:

The Clerk: What is your name, please?
The Witness: James Hurd, H-u-r-d.
The Clerk: James Hurd. Thank you.

By Mr. Somerville:

Q. What is your name, sir?
A. James Hurd.
Q. Will you tell us where you live?
A. Salem, Oregon.
Q. What business are you currently in? What is your employment?
A. Well, I am an L-O operator for Richfield Oil Corporation.
Q. How long have you operated this station, Mr. Hurd?
A. It will be four years in July.
Q. It is what you call a leased out station?
A. That's right.

Mr. Somerville: May it be stipulated, counsel, that Richfield, as lessor, entered into a 542 lease, print date 11-45, [fol. 2537] with James G. Hurd, as lessee, covering the premises at 590 North High Street, and specifying a minimum rental of $40 per month, plus one cent per gallon in excess of 4,000 gallons.

Mr. DeMartini: It is so stipulated, and the lease is dated July 14, 1947, and it is at Salem, Oregon.

Mr. Somerville: At Salem, Oregon. And that there is a rider attached, executed March 2, 1948, specifying a minimum rental of $62 a month.

Mr. DeMartini: Not a minimum rental, a flat rental.

Mr. Somerville: A flat rental.

Mr. DeMartini: There is no gallonage rental.

Mr. Somerville: That is correct. And then there is a subsequent lease between the same parties, dated April 30, 1948, covering the same premises, on Form 542, print date 11-45, specifying a flat rental of $62 a month.

Mr. DeMartini: But no added gallonage rental.

Mr. Somerville: That is correct, sir.

Mr. DeMartini: So stipulated.

[fol. 2538] By Mr. Somerville:

Q. At the time that you entered into the first lease involved here, Mr. Hurd, did you have any discussions with —first of all, who did you deal with in the execution of this lease?

A. Well, our territorial merchandiser at that time was William H. Loop.

Q. Were there any discussions concerning the 24-hour cancellation clause of that lease?

A. Well, that was understood. We knew it, both.

Mr. Paradise: I can't hear you.

A. I knew it. I knew it was in the contract, yes, the lease.

By Mr. Somerville:

Q. Did you have any discussions concerning the conditions under which that 24-hour clause was to be exercised? Were you told under what circumstances that might be exercised?

A. Well, how do you mean?

Q. What I am trying to get at is, did you have any conversation of any character concerning the conditions under which the 24-hour clause would be exercised? Did they tell you under what circumstances a 24-hour notice might be served upon you?

A. No.

Q. Did Mr. Loop turn over the premises to you?

A. Yes, sir.

[fol. 2539] Q. Did you invest any money in this station?

A. Not in the property, the stock and equipment.

Q. Oh, I meant did you invest any money in the business?

A. Yes.

Q. What did that investment consist of?

A. It was a little over $8,000.

Q. What was included in it, what merchandise or equipment were included in that?

A. Stock and equipment.

Q. Did that include some merchandise that you purchased from the former operator of the station?

A. Yes, all of it.

Q. All of the whole business. Was there any competitive merchandise, competitive in the sense there was an equivalent approved item sold through the TBA distributors?

A. Yes.

Q. What were some of those competitive items you purchased?

A. Zenith tires, Lincoln batteries and filter elements.

Q. Did you subsequently have any discussions with any Richfield representatives concerning the Zenith tires or Lincoln batteries?

A. Yes.

Q. With whom?

A. Loop and Hayworth.

[fol. 2540] Q. Who is Mr. Hayworth?

A. He was manager for the Salem distributorship.

Q. The Salem Distributing Company, the authorized TBA distributors?

A. No. I mean he was the Salem agent for Richfield Oil Corporation.

Q. Oh, I see. Did these conversations occur with both men present?

A. No.

Q. Oh, you had two conversations, then. Let us take one at a time, then. First of all, Mr. Loop, about when did you talk to Mr. Loop?

A. The fall of 1947.

Q. What did Mr. Loop say to you?

A. He advised me to replace the tires, batteries and tubes, and any other merchandise in there with approved products.

Q. When did you talk to Mr. Hayworth?

A. In 1948.

Q. And what did he say concerning the products?

A. He said the same thing.

Q. Did he tell you to get rid of them?

A. Yes, sir.

Q. What did you do? Did you get rid of them?

A. Well, eventually I replaced them.

Q. Was there any particular advantage to you in han-
[fol. 2541] dling these products?

A. I had a competitive price line in the other products.

Q. Did you have any desire to continue handling these products?

A. Yes.

Q. Did you have any particular customers that wanted Zenith tires?

A. Yes.

Q. Were those customers you had previously sold Zenith tires to?

A. Yes.

Q. Did you have customers who would like—what brand of batteries were those?

A. Lincolns.

Q. Did you have some customers who asked for Lincoln batteries?

A. Not necessarily by name. They wanted a lower priced battery. They are a competitive line.

Q. Was that lower priced?

A. Yes.

Q. Than the Goodyear approved battery?

A. Yes.

Q. With respect to fan belts, did you have any competitive fan belts?

[fol. 2542] A. They were practically all competitive.

Q. What brands?

A. Oh, Gates, Raybestos, Greyrock.

Q. Did you have any situation arise in which your attention was called to the fact that you were handling competitive belts?

A. At the time that I went into this station we had agents there that were replaced in 1948 with Richfield operators, the plant there in Salem was. And he came in one day, one of these agents, in 1947, the fall of '47, and took all the fan belts down and put Goodyear sleeves on them.

Q. And did you thereafter replace those belts with Goodyear approved belts?

A. Most of the time.

Q. Was there any particular advantage to you in handling those belts?

A. In handling Goodyear?

Q. In handling the Gates or other competitive belts. Did you have customers that asked for them?

A. Not necessarily, not for fan belts.

Q. Was there any price advantage?

A. No.

Q. Did you ever handle any competitive oils?

A. Yes.

Q. What kind, what brands?

[fol. 2543] A. Quaker State.

Q. Did you display this oil?

A. No.

Q. Did you have any reason for not displaying it?

A. I was told not to.

Q. By whom?

A. Mr. Loop, Mr. Hayworth, and Mr. Lalande.

Q. When?

A. Practically all of them.

Q. When?

A. From the time I went in there.

Q. Did you have any customers who requested these oils?

A. Yes.

Q. Did you ever have competitive salesmen? I am talking about salesmen other than your TBA distributors of products at the station?

A. Yes.

Q. Did they sometimes offer other automotive accessories at a better price than you were able to get?

A. Sometimes.

Q. Did they ever offer items that were approved at a better price than the TBA distributors?

A. The prices were the same. They were fair-traded.

Mr. Somerville: Your witness.

Mr. Paradise: No questions. Oh, wait a minute. Forgive [fol. 2544] me. No questions.

Mr. Somerville: The Government calls Mr. Tyler Brown.

Tyler J. Brown, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Witness: Tyler J. Brown.

Direct examination.

By Mr. Somerville:

Q. Where do you reside, Mr. Brown?

A. Salem, Oregon.

Q. What business are you currently in?

A. Well, I am used car manager for the Nash dealer at the present time. Up until that time I was employed by R. D. Woodrow Company, distributor of parts and accessories for 11 years.

Q. Did the R. D. Woodrow Company supply the usual automotive line of accessories that were handled at service stations?

A. Yes, they did.

Q. What was the particular area in which that company made its sales?

A. We covered five counties out of Salem.

Q. Are you familiar with the products and the sources of the products that were handled by R. W. Woodrow Company?

A. It is R. D. Woodrow Company. Yes, I am.

[fol. 2545] Q. Did the company handle tires?

A. Tires, batteries, battery cables, wiring terminals, light globes, Champion spark plugs, various and sundry.

Q. Will you tell us the brand of tires handled by the com-

pany and the source from which it received its supplies of those tires.

A. Well, we carried the Kelly-Springfield tire which was warehoused by Kelly-Springfield Tire Company in Portland, and also the Seiberling tire, which was warehoused in Portland. That is where we got both tires.

Q. Were those warehouses of the tire manufacturers?

A. Yes.

Q. Do you know where the tires were manufactured?

A. Well, I don't recall, no.

Q. What kind of batteries do you handle?

A. Willard.

Q. Where do you receive your Willard batteries?

A. Well, we received a great number of them from Los Angeles and some from Cleveland. Towards the end of the season, I think they built the factory in, I believe, '48 or somewheres in '48 in Portland. We got a few from Portland towards the end of my time I was there.

Q. Would the same be true of battery cables?

A. Yes, we ordered those through Willard.

Q. What brand of fan belt?

[fol. 2546] A. Dayton.

Q. And where do you receive those belts from?

A. From Portland, the jobber in Portland.

Q. Were they manufactured in Portland?

A. No. I believe in Dayton, Ohio.

Q. Did you handle spark plugs?

A. Yes, Champion.

Q. Are you familiar with what brands of spark plugs are authorized or approved by Richfield?

A. Yes, Champion, also.

Q. Did you handle light bulbs and various automobile lights?

A. We did, General Electric globes made by the General Electric Company.

Q. What brand is Richfield approved?

A. General Electric.

Q. Did you handle oil filters?

A. Yes, Cyclone. They were manufactured in Yoncalla, Oregon, about 35 miles out of Portland.

Q. How often were you receiving shipments of these items?

A. Well, we would place orders about every month on practically all of our items, according to how fast the turnover was. Our batteries we would order every month, along with cables at the same time, tires would be the same. Passenger cars, of course, we would order more of than we [fol. 2547] would truck tires, but it was according to what the turnover was.

Q. I believe you testified that you were a salesman. What particular area did you sell in?

A. I covered the City of Salem and five counties out of Salem.

Q. I call your attention to a service station on North Front and Center Street operated by a Lawrence C. Anderson. That is in Salem. Do you remember the particular station?

A. Yes, I do.

Mr. Somerville: It may be stipulated, counsel, that Mr. Anderson operates a leased out station and did during the period to which this witness will testify.

Mr. Paradise: So stipulated. That is on a Form 542?

Mr. Somerville: Yes, sir.

Mr. Paradise: Okay.

By Mr. Somerville:

Q. What period—first of all, did you make any sales to Mr. Anderson? Did you develop an account there?

A. Well, yes, I did, during the war—oh, I would say the latter part of '41 or '2 we sold him merchandise. Of course, the supplies were very hard to get then. You could sell them to Standard Oil if you wanted to.

[fol. 2548] Q. Would you call this account a good account?

A. Yes, during that time, when supplies were short.

Q. Did he continue to buy after the war?

A. Well, he did up until about the latter part of '46, I would say, or '7. Then it dwindled down. I was talking to him one day to find out what the score was, because——

Q. About when was that? About in '47?

A. Yes, '47, or the latter part of '46. I think the latter part of '46. The sales were dropping off.

Q. Where were you talking to him?

A. In his station.

Q. Was there anyone else present?

A. There could have been, but I didn't pay any attention.

Q. Tell us what was said.

A. He said, "Now that the oil company is getting more supplies, why, they are putting the heat on me to buy some of theirs." I did continue selling him some tires and batteries, but they kept them out in the back room, hid. But the sales dropped down quite a bit. Of course, tires and batteries were very scarce at that time.

Q. Did he indicate why he couldn't handle these items?

A. Well, yes, it was just the same old story, that they just can't do it.

However, there were some items I did continue selling [fol. 2549] them, such as spark plugs. They couldn't tell the difference on that. I could put spark plugs in there, and unless they checked his records on what he was selling, they wouldn't know the difference. The same with light globes.

Q. Was the decline in the sales you were making to Mr. Anderson abrupt?

A. Well, it seemed to be tapering off quite rapidly.

Q. Did he ever indicate any dissatisfaction with your products?

A. No.

Q. Did he ever indicate satisfaction?

A. Well, yes, he liked to carry the—well, especially the tires. It was a competitive tire, and we gave him a better price on it. And the Willard batteries, he had several customers that would ask for Willard batteries. There are a lot of cars that come equipped with Willard batteries, and they want the same thing put back in their automobiles.

Q. Did he tell you that at any time?

A. Yes. That was the reason he put them in the back there, so he could have them on hand and wouldn't have to come over to get them, or we might be closed when he would be needing them.

Q. Now, do you recall a service station operator by the name of Albert Espey at 867 South Commercial Street, in Portland?

[fol. 2550] A. In Salem?

Q. In Salem.

A. In Salem, yes.

Mr. Somerville: May it also be stipulated that this was an L-O station on a 542 lease?

Mr. Paradise: Yes, at all times during the time that this witness testifies to, the station was operated by Mr. Espey under an L-O lease.

Mr. Somerville: During all the time I expect him to testify to.

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. Mr. Brown, did you make any sales of your products to this man?

A. No, I didn't.

Q. Did you personally call on the station?

A. I did.

Q. When?

A. Well, it was shortly after he opened up. I just can't recall the date. It was probably in '47, the last of '47 or '8. I am not sure on that, but it was shortly after he opened the station, or shortly after he went in there.

Q. Did he say anything to you about whether he could buy from you?

A. Well, naturally, when you first go in to call on a man on opening his station, you start trying to sell your line [fol. 2551] to him, of course, and I didn't get very far until he told me he was obligated to buy from the Richfield Oil Company, that that was his understanding when he went into the station, that he had to buy their products. So I called there about three or four times, and quit calling on him.

Q. You didn't sell him anything?

A. No.

Q. Did you ever call on a service station operated by Mr. Hurd, at 590 North High Street, Salem, Oregon?

A. Yes.

Q. Is that the gentleman who just testified?

A. That's right.

Q. Over what period did you call on him?

A. Well, that was shortly after he had opened up, or bought out the other operator. I believe it was in '46, or '47, or '8; or the latter part of '47.

Mr. Paradise: Just for clarity in the record, Mr. Hurd was an L-O operator in a Richfield station at that time?

Mr. Somerville: Yes, sir.

By Mr. Somerville:

Q. Did you sell him any of your products after you called on him?

A. Well, no. He had about the same set-up as Mr. Espey's set-up. I did have one item that I sold him, which was an Ansco window wiper cabinet. It was quite a deal. At the time Richfield was not handling those. They do now, [fol. 2552] however, have them in their line, but at that time that was the only item that I had that I was able to sell him which Richfield didn't display.

Q. Did Mr. Hurd tell you that, that Richfield didn't handle the Ansco wiper?

A. Oh, yes. He liked the deal all right, and being Richfield didn't handle them, I suppose he was able to put them in.

Q. I am only interested in what he actually told you, now. At any time did you have any discussions with him concerning his ability to purchase items from you?

A. Well, he would like to, but it seems like—if that is what you mean. I don't quite get your question there.

Q. Yes, what I mean is, did you have any conversations concerning his lack of purchases from you, or your inability to sell him?

A. Oh, no, not that. It was just that he couldn't buy any of the items that Richfield had.

Q. Did you have some conversation with respect to the items that he could buy from you?

A. Well, yes, but I had nothing that I could sell him—not sell him—I mean, that he could buy without Richfield seeing it, unless he would hide it.

Q. What was the item you were able to sell this man?

A. Hurd?

[fol. 2553] Q. Yes.

A. Well, that cabinet deal was all I was ever able to sell him.

Q. What do you mean by "cabinet"?

A. It is a cabinet of the windshield wipes, blades, and so

forth. It is a cabinet, and one blade will take care of all the needs.

Q. Did you ever call on a service station operated by Albert Rupp, at 1026 North Commercial Street, Salem, Oregon?

A. Yes.

Q. Is that the one they call the Commercial Street "Y"?

A. Well, it is in a Y. I have lived there for thirty years, but I don't know whether they call it that or not. Maybe they do, but that's where it is located.

Q. When did you first call on Mr. Rupp?

A. Well, you got me there, too.

Mr. Somerville: May it be stipulated that this is an L-O station under Form 542?

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. Did you ever sell any of your products to Mr. Rupp?

A. No, I didn't.

Q. Did you have any conversations with him at that time concerning his buying your products?

[fols. 2554-2557] A. Yes, shortly after he moved in there, I called on him, as I always did.

Q. What did he tell you at that time?

A. Well, he said that he was obligated, or indicated as much, that he would have to buy from Richfield, that he could not buy my batteries or tires, whatever I might have. So I called on him about twice, and I never called on him any more.

Mr. Somerville: Your witness, counsel.

Mr. Paradise: No questions.

Mr. Somerville: Thank you, Mr. Brown.

The Court: Step down.

(Witness excused.)

Mr. Somerville: If the court please, we have run out of witnesses on time.

The Court: That is a good time to run out.

I gather, the way you are going, you intend to finish tomorrow?

Mr. Dixon: I think that is correct, your Honor, yes.
The Court: I beg pardon?
Mr. Dixon: I believe we will, your Honor, yes.
The Court: All right. Tomorrow morning at 10:00 o'clock.

(Whereupon at 4:55 o'clock p. m., Tuesday, May 22, 1951, an adjournment was taken until 10:00 o'clock a. m., Wednesday, May 23, 1951.)

[fol. 2558] The Court: All right, gentlemen, proceed.
Mr. Alexander: The Government will call Mr. Behm as its first witness, please.
ARTHUR A. BEHM, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, sir?
The Witness: Arthur A. Behm.

Direct examination.

By Mr. Alexander:

Q. Where do you live, Mr. Behm?
A. Manhattan Beach.
Q. What is the nature of your occupation or business?
A. I am a tire salesman for the Leland A. Irish, Inc., distributor of Kelly-Springfield tires and Exide batteries.
Q. Will you describe briefly the source from which your firm obtains the merchandise?
A. We distribute Kellys, which are the Kelly-Springfield Rubber Co. of Cumberland, Maryland, and Exide batteries, I believe, is by the Electric Storage Battery Co. of Philadelphia.
Q. What is the territory of operations in which your company conducts its sales and marketing?
[fol. 2559] A. Our company?
Q. That is, your firm, yes, sir.
A. Primarily Southern California where the metropolitan distributors have Kelly-Springfield tires, primarily.
Q. Does it employ outside salesmen?
A. Four.
Q. Four salesmen?

A. Yes, sir.

Q. In your capacity as a salesman do you regularly call on service station accounts in the sale of those Kelly-Springfield tires and Exide batteries?

A. Yes. I call on approximately 50 retail outlets, service stations of all kinds.

Q. Do you call on service stations bearing the Richfield colors, selling Richfield gasoline?

A. I did. I don't now.

Mr. Alexander: Counsel, will it be stipulated that the locations of the operators that this witness will testify to will be L-O operators?

Mr. Paradise: Yes, in L-O stations of Richfield.

By Mr. Alexander:

Q. Calling your attention, Mr. Behm, to the service station located at 1138 Highland Avenue, Manhattan Beach, operated by Benny Jones, have you called on that station and attempted to make sales of your merchandise?

A. No, sir, I don't, not now. I did.

[fol. 2560] Q. No, I say, have you?

A. Oh, yes. I was calling on there when I was told not to call there.

Q. You have called on that station?

A. Yes, sir.

Q. Calling your attention to the years 1945 and 1946, did you attempt to make sales of tires and batteries at this location?

A. Yes, sir.

Q. Were you successful?

A. I had been selling them right along until I was ordered by the supervisor not to call there any more.

Q. Mr. Behm, did you have conversations with Mr. Jones or any representatives of Richfield Oil Corporation in connection with your sales of tires or batteries at this location?

A. Yes. I had been selling Mr. Jones for some time when a supervisor by the name of Benny Vaughn, I met him there one morning when I was delivering two tires.

Q. Excuse me just a moment, Mr. Behm. When was this, approximately?

A. About 1945 or '46. And Mr. Vaughn became very

angry and said they had a considerable investment in that location and it was not their policy for Mr. Jones to purchase from anyone other than their suppliers, I believe Goodyear at the time was their regular source of supply. [fol. 2561] We had quite a heated argument, because I thought I should have a right to call on the account.

Mr. Paradise: I move that that be stricken.

Mr. Alexander: Just conversations, Mr. Behm.

The Court: That is a conclusion.

A. I told him I would continue to call there, that I had a right to call on an account. I had sold previous operators there for some time, and that I would continue to call there. And Mr. Vaughn told Mr. Jones in my presence that if he continued to buy from me, he would lower the boom on him. What that meant I don't know. That was his exact words.

[fol. 2562] By Mr. Alexander:

Q. Mr. Behm, calling your attention to a service station at the corner of Imperial and Sepulveda Boulevard in Los Angeles, operated by Mr. Ray Scofield, have you attempted to make sales of your merchandise at that location?

A. Yes, sir. Ray Scofield was a good outlet of mine until I met the same gentleman, Mr. Vaughn, there.

Q. Excuse me. When did this take place, Mr. Behm?

A. About the same time, that is, I believe between '45 and '46. Mr. Scofield had the station, and the same thing occurred there. I was delivering Kelly-Springfield tires and Exide batteries, and Mr. Vaughn told Mr. Scofield that he would have to purchase Goodyear batteries and not to buy any more Exides from me.

Q. Did you thereafter make any attempt to make sales at that location?

A. Well, I found it rather futile, because they put the operator in a bad light, so that my business practically stopped then.

Mr. Alexander: No further questions.

Cross-examination.

By Mr. DeMartini:

Q. How do you pronounce your name,—is it Behm or Behm?

[fol. 2563] A. Behm.

Q. You stated you call upon fifty accounts?

A. Various service stations throughout the south Bay area, yes, sir.

Q. How many of those do you sell?

A. Well, I would say I do a little business with most of them.

Q. How often do you call upon these accounts that you sell?

A. I call on them approximately twice a week, depending on the service they require, and they phone me a great many times when they want merchandise. I actually sell and deliver the merchandise in a half-ton truck.

Q. How many times do you call upon an account as a rule to whom you can't sell before you give it up as a bad job?

A. That would depend on my reaction to the account, I would say.

Q. Do these people normally give reasons for not buying from you?

A. Oh, not necessarily. Sometimes they——

Q. Do they ever give reasons?

A. Yes, I would say sometimes that they don't particularly like my product, or for some reason they don't want my service.

[fol. 2564] Q. How long have you been in this business, Mr. Behm?

A. I have been with this firm I am with now for 25 years. I went with them in 1926.

Q. Do you supply advertising signs?

A. Yes, sir. Yes, sir, we do.

Mr. DeMartini: I think that is all.

Mr. Alexander: Just one further question, your Honor.

Redirect Examination.

By Mr. Alexander:

Q. Mr. Behm, in response to Mr. DeMartini's questions you said you called on approximately 50 accounts?

A. Yes, sir.

Q. What oil companies' colors are being displayed on these various service station outlets that you call on?

A. Oh, I don't pay any attention to that. I go into all service stations.

Q. Perhaps I can help you, Mr. Behm. Do you call on Shell stations?

A. Yes, sir.

Q. Do you call on Standard stations?

A. Yes, sir.

Q. Do you call on Tide Water stations?

A. Yes, sir.

Q. That is what I had in mind, sir.

[fol. 2565] I simply cover the territory where they retail tires and batteries, regardless of what sign they display.

Mr. Alexander: That is all, Mr. Behm. No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Alexander: The government will call Mr. Poseley.

Jerome F. Poseley, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination:

The Clerk: What is your name, please?

The Witness: Jerome F. Poseley.

The Clerk: The spelling of your last name?

The Witness: P-o-s-e-l-e-y.

By Mr. Alexander:

Q. Where do you live, Mr. Poseley?

A. Santa Monica.

Q. What is the nature of your business?

A. I am a salesman for Boggs & McBurney.

Q. What is the nature of the business of Boggs & McBurney?

A. We are automotive parts jobbers, handling tools, [fol. 2566] parts, and supplies.

Q. What is the area in which the Boggs-McBurney Company carries on its operations?

A. Roughly, West Los Angeles.

Q. Are you familiar, Mr. Poseley, with the source of the merchandise that you sell for your firm?

A. Yes, I am.

Q. Will you relate some of the products that are sold and are handled by Boggs & McBurney

A. We carry Raybestos brake lining and fan belts. That is manufactured in Bridgeport, Connecticut. We carry Fram filters manufactured in Providence, Rhode Island. Champion spark plugs manufactured in Toledo, Ohio, and Exide batteries, and Puralators. More?

Q. Do you know the approximate amount of the volume of business that is done by your firm in the sale of this merchandise?

A. Yes, sir. It runs around $200,000 a year.

Q. How long have you been employed in this capacity?

A. I went to work for Boggs & McBurney in November of '44.

Q. In the course of your selling this merchandise, have you called upon service stations bearing the Richfield Oil Corporation's colors?

A. Yes, I have, sir.

[fol. 2567] Mr. Alexander: Counsel, may it be stipulated that the service station locations that this witness will testify to are L-O stations?

Mr. Paradise: So stipulated, all L-O stations.

Q. By Mr. Alexander: Calling your attention, Mr. Poseley, to a station located at 531 South Sepulveda Boulevard, West Los Angeles, operated by Mr. Ray Shillito, are you acquainted with this operator?

A. Yes, I am.

Q. Have you attempted to make sales of your merchandise at this location?

A. Yes, I have.

Q. When did these attempts occur, Mr. Poseley?

A. When I started to work for Boggs & McBurney I called on Ray Shillito. That was in November '44, and I sold him quite a lot of merchandise in '45 and '46. In about '47, why, business began to taper off, and one of the lines

that I sold him was Exide batteries, and Ray told me that he couldn't possibly handle them any more, because Richfield was putting the pressure on him, and he would just have to stop. I also sold him Rislone filter cartridges, spark plugs, which I no longer sell him for this reason: he told me he had a 24-hour lease, that he had been there for a long time and worked up a good business, and he couldn't possibly antagonize Richfield, although he would like to buy [fol. 2568] some of my products, and still does, things that Richfield doesn't handle.

Q. Do you handle, your firm, the Richfield approved merchandise?

A. We handle a lot of it, yes. We handle Champion spark plugs, Puralator fan belts, Rislone, Casite, things like that, Stamp radiator caps.

Q. Mr. Poseley, calling your attention to a service station located at 1401 Westwood Boulevard, West Los Angeles, operated by a person by the name of George Lance, have you attempted to make sales of your merchandise at that location?

A. Yes, I have.

Q. About when did these attempts occur?

A. Approximately the same time. George Lance was one of our very good customers, bought all his batteries from us, and had quite a lot of brake lining and ignition work that we sold him, and at the end of about '46 he told me that as much as he would like to buy Exide batteries, he couldn't possibly do it, because he had to keep on good terms with Richfield, and he couldn't possibly continue to buy my batteries.

[fol. 2569] Q. Did you have any further conversations with him?

A. Well, I called. The station is now handled or run by Bruce Nudd who used to work for him and I call on them, still call on them every two weeks. I still sell them ignition brake-lining, things like that, always have, tools, but I can't sell them anything that Richfield handles. He says he just can't do it.

Q. Have you had any conversation with Mr. Nudd in attempting to sell your merchandise?

A. The same conversations. I asked him just a little while ago if he would buy these heater hoses which he

needed, and he said, "Don't be silly. I can't buy that heater hose, Poseley, and you know it."

Q. Calling your attention to a service station at 1501 Santa Monica Boulevard operated by George Lance, have you attempted to make sales at that location?

A. Yes, I have. When George opened that station he called me on the telephone and told me to come down, and he bought a lot of tools and different supplies that he needed, that he couldn't buy from Richfield. At that time I asked him if I could sell him any Puralators or spark plugs to open his new station, and he laughed and he said, "You know darn well I can't do that, Poseley."

Q. About when did this take place, Mr. Poseley?

A. Well, that was last summer.

[fol. 2570] Q. 1950?

A. Yes, sir.

Q. Calling your attention then to a service station located at Westwood and Pico, Los Angeles, operated by Mr. Al Olson, have you attempted to make sales of your merchandise at that location?

A. Yes, I have. Mr. Olson also is a customer of ours, and anything that Richfield doesn't have, starters, generators and things like that. When he first opened, I sold him some Fram filter cartridges.

Q. Mr. Poseley, about when was that, if you know?

A. I believe that was about three years ago.

Q. 1947 or '48?

A. I think it was in '47 that Al took over that station and I sold him some C-4 Frams, which are standard equipment of Fords, and which he said he thought he ought to have. And the next time I came around they were hidden down under the counter and he said that he couldn't buy them from me any more because, in order to get tires, which were short at that time, why, he had nothing that Richfield didn't sell or any line that they didn't have, he had to stock only their line.

Q. Calling your attention to a service station located at 10350 Olympic Boulevard operated by a Lou Snyder, did you attempt to make sales of your merchandise at that location?

[fol. 2571] A. Yes, I have. He was running that.

Q. When did that occur, Mr. Poseley?

A. In 1945 and 1946.

Q. Did you have a conversation with Mr. Snyder in that connection?

A. Yes, I have. Lou Snyder was running that station when I started to call on him, and at first I sold him quite a lot of filter cartridges and Casite and spark plugs. But it wasn't over about—oh, I would say nine months or a year before Lou told me it was impossible to buy any of those products from me any more, but he would continue and did continue to buy other things that Richfield didn't have that we handled, like other generators and mufflers and things like that.

Q. But none of the approved merchandise?

A. None of the approved merchandise would he buy from me.

Mr. Alexander: No further questions.

Mr. Paradise: No questions.

The Court: All right.

Mr. Alexander: The Government will call Mr. Marx.

CASPER E. MARX, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

[fol. 2572] The Witness: Casper E. Marx.

Direct Examination.

By Mr. Alexander:

Q. Where do you live, Mr. Marx?

A. In Eagle Rock.

Q. Eagle Rock. What is the nature of your employment?

A. I am a salesman.

Q. Have you ever been employed by the Hal Moody Tire Company?

A. Yes.

Q. When did this employment occur?

A. From 1946 until November of last year, 1950.

Q. What is the type of business of Hal Moody Tire Co.?

A. It has a Fisk line, tire distributor, battery distributor.

Q. What is the area in which he markets his products?

A. Glendale, Highland Park, Burbank, Hollywood, in that area.

Q. Are you familiar with the source from which the Hal Moody Tire Co. obtains its merchandise?

A. Well, the Fisk line comes from Chicopee Falls, Massachusetts, Pennsylvania tires were Jeanette, Pennsylvania, Exide batteries, I believe it is Philadelphia.

Q. Were you familiar during your employment there with approximately the amount of annual average volume [fol. 2573] of business done by this company?

A. I would say it was between sixty and seventy-five thousand dollars a year.

Mr. Alexander: Counsel, may it be stipulated that Mr. Marx's testimony will pertain to L-O stations only?

Mr. Paradise: So stipulated.

By Mr. Alexander:

Q. Mr. Marx, calling your attention to a service station located at 600 West Glenoaks in Glendale, operated by Mr. M. D. Whiting, are you acquainted with this location?

A. Yes.

Q. Have you attempted to make sales of your merchandise at that station?

A. Yes.

Q. Did you have conversations with Mr. Whiting during these periods?

A. About 19—I think it was around—'47, I sold him some Pennsylvania tires. I believe there were six or eight, something like that.

Q. Did you have any conversations with him in connection with that sale?

A. Oh yes. Only that he said that he couldn't keep the tires in the station and he carried them in the back of his car, in the trunk of his car.

Q. In other words, they were not openly displayed? [fol. 2574] A. No.

Q. Did you subsequently have any discussions with him in attempting to sell tires or batteries?

A. On Exide batteries he agreed that Exide was a good battery, but he couldn't possibly stock them or display them.

Q. Calling your attention to a service station located at 3810 North Figueroa Street, Los Angeles, operated by Mr. Carlin McKnight, have you attempted to make sales of your products at that location?

A. Yes.

Q. Do you recall having had any conversation with Mr. McKnight in that connection?

A. At one time we had a deal with, I believe it was Nickel Silver batteries that we would furnish his stand. He said he would like to handle the batteries and he could certainly use the stand but he could not possbly put them in the station.

Q. Did he tell you the reason why he could not?

A. Well, because of the supervisor of Richfield, of course, would bring him to task on it and there would be some involving there, that he would just as soon not get into with Richfield Company.

Q. Calling your attention to a service station located at 874 Vermont Street, Los Angeles, operated by Mr. George Enright, have you attempted to make sales of your tires or [fol. 2575] batteries at that location?

A. Yes. I have sold him tires and batteries, too. He would never display them and the batteries were kept under one of the shelves and covered up, and the tires in most cases were not displayed. There would be one in a second line or something like that.

Q. And did you ever have any conversations with Mr. Enright in connection with the displaying or purchasing of your merchandise?

A. Well, the reason was because of his agreement or his arrangement with Richfield, he couldn't display anything like that and handle it.

Q. Calling your attention to a service station located at Grand View and San Fernando Road in Glendale operated by Mr. Sam Aeschlian, have you attempted to make sales of your merchandise at that location?

A. Yes.

Q. Will you describe to the court the circumstances under which those attempts took place?

A. How is that?

Q. Will you describe to the court what took place during those attempts to make sales?

A. Well, the product would be accepted, as he would like to handle them, but he couldn't display them or have them in the station.

[fol. 2576] Q. Did he tell you the reason why he could not do so?

A. Because of his arrangement with Richfield Oil Co.

Q. Did he make any complaint as to the quality of your merchandise?

A. No.

Q. He apparently was satisfied?

A. Never for that reason.

Q. In connection with each one of these customers that you have testified to did any of them make complaints as to the quality of your merchandise?

A. Never.

Mr. Alexander: No further questions, your honor.

Mr. Paradise: No questions.

The Court: All right, call your next witness.

Mr. Somerville: The Government calls Ralph Long.

Ralph E. Long, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ralph E. Long.

Direct Examination:

By Mr. Somerville:

Q. Mr. Long, would you tell us where you reside?

A. LaGrande, Oregon.

Q. What is your present business or occupation?

[fol. 2577] A. I am a salesman for Roy Farnham Supply Co.

Q. Will you describe to the court the type of products that Roy Farnham Supply Co. market?

A. We supply the locality there. We specialize in general parts and radiator items such as sealers, flushes, addatives to oil.

Q. Does your company sell products to service station accounts?

A. Yes.

Q. What would some of those products be?

A. Exide batteries, Fram filters, Gates fan belts, Rislone petroleum solvent products, seals such as that, Packard cables.

Q. With respect to the Gates fan belts from where do you receive your supplies of those belts?

A. We receive our supply from Portland.

Q. Do you know whether that is a manufacturer's representative or——

A. No. That is a warehouse.

Q. A warehouse.

A. Yes.

Q. Do you know where those belts are manufactured?

A. I have seen where they were manufactured in Denver on some of them. They are manufactured in various parts of the country, depending upon where they draw their [fol. 2578] supply from.

Q. On Exide batteries would you tell the court from what source you receive Exide batteries?

A. Electric Storage Battery Co. They are shipped to us from Portland but they are ordered through Seattle. They have a warehouse there in Portland, and then they come from the east.

Q. Do you know where those batteries are manufactured?

A. I believe it is Pennsylvania.

Q. What type of filters does your company deal in?

A. Fram.

Q. Fram, and from what source do you obtain the Fram filters?

A. We receive them from a warehouse in Portland, and then they are manufactured in Providence, Rhode Island, I believe.

Q. I believe you testified that you handle Packard battery cables, is that correct?

A. Yes.

Q. From where do you receive those?

A. We receive those directly from the factory.

Q. Where is that located?

A. I am sorry, I can't tell you. It is an eastern city.

Q. Outside of the state?

A. Outside of the state, yes.

[fol. 2579] Q. Do you handle chemical lines, waxes and polishes and the usual chemicals, radiator seals that are sold at service stations?

A. We handle duPont's products, Max products which are represented by sealers and cleaners, polishes and waxes.

Q. And from what sources do you obtain the particular products?

A. The majority of them come out of a warehouse in Portland, although they are received from different localities over the country out of there, from out of state.

Q. Do you receive some shipments direct from manufacturers outside the State of Oregon?

A. Yes, depending upon the amount of the order. We do receive direct shipments on duPont items from out of state.

Q. Do you handle spark plugs?

A. Champion.

Q. From what source do you receive spark plugs—Champion spark plugs?

A. Depending on the quantity again. Small quantities come out of Portland and we get direct shipments from factories on other orders.

Q. Do you happen to know where the factories are located?

A. I believe that is Pennsylvania. I am not in that department.

[fol. 2580] The Court: But not in the State of Oregon?

The Witness: No. They are definitely not in the State of Oregon.

The Court: They are out of state?

The Witness: Out of state, yes.

Q. By Mr. Somerville: Do you happen to be familiar with the brand of spark plugs approved by Richfield and advertised at Richfield stations?

A. Champion.

Q. Do you handle piston rings?

A. Perfect Circle piston rings.

Q. From where do you receive the piston rings?

A. Well, we receive some from our warehouse in Portland, and also, depending on the volume of the order, sometimes directly from Hagerstown, Pennsylvania.

Q. What is the particular area in which your company markets these products?

A. Generally, it is Union, Cove County, and Baker County, which takes in Haines, North Powder, Union, LeGrande, Cove, for my particular territory. We have another representative who covers——

Q. How many salesmen does your company employ who would contact service station outlets?

A. Two.

Q. And what is your particular area?

[fol. 2581] A. The ones I just named, that I just gave you the names of.

Q. Do you recall ever calling at a station operated by Ralph Hardy and Richard Parsons at Fourth and Spring Streets, LeGrande, Oregon?

A. Yes.

Mr. Somerville: May it be stipulated, counsel, that this is an L-O unit?

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. Approximately when did you first call at these stations?

A. I called when they first opened up. I believe it was in about March originally when they first opened.

Q. March of what year?

A. Of '49.

Q. Did you attempt to sell your products?

A. Yes.

Q. Were you generally successful?

A. Well, not too much so, no.

Q. Were you able to sell them some Champion spark plugs?

A. Only on fill-in orders.

Q. Did you ever attempt to sell your Exide batteries to this station?

A. Yes.

Q. Do you recall any particular incident in which you [fol. 2582] explained your price and your guarantee on these batteries?

A. Yes.

Q. About when did that occur?

A. That occurred in August, last year.

Q. And with whom were you talking?

A. Ralph Hardy.

Q. At the station?

A. At the station, yes.

Q. In the course of the discussions were there any comparisons made with prices of Goodyear batteries between your batteries and Goodyear?

A. On the price structure, my prices on the particular batteries were a little cheaper.

Q. Was there any discussion at that time concerning whether or not these men operating the station could purchase competitive products?

A. Yes. Mr. Hardy told me that he liked my battery very well, he liked our guarantee, would like to handle the batteries, but that under his contract with the oil company he would be unable to do so, that is, he could not stock it.

Q. He could not stock it?

A. He could not stock the batteries.

Q. Were you subsequently able to sell him any?

A. Very few.

[fol. 2583] Q. Was that during the period of battery shortages?

A. No, not necessarily battery shortages. There could have been a slight shortage at that particular time.

Q. Under what circumstances did he buy those batteries? Did he display them?

A. No, he wouldn't display them. He couldn't display them, so he told me. He would have to sell his customers, and then he would pick them up, or we would deliver them to him.

Q. Now, with respect to a service station there in La-Grande, operated by Kenneth Gregory, does that strike a familiar chord?

A. Yes, it does.

Q. Where is his station located?

A. His approximate address I couldn't give you.

Q. Is it Penn & Pine?

A. Yes, sir, that is the right address.

Q. How long have you called on Mr. Gregory?

A. I believe it has been three years now that he has been in that station.

Q. Have you made some sales to Mr. Gregory?

A. Yes.

Mr. Paradise: Do we have the same stipulation concerning the service station operated by Mr. Gregory?

Mr. Somerville: Yes. I am sorry.

[fol. 2584] Mr. Paradise: That it is a Richfield L-O station?

Mr. Somerville: It is a Richfield L-O station.

Mr. Paradise: Thank you.

By Mr. Somerville:

Q. Do you recall any instance in which, or, did you have any conversations with Mr. Gregory concerning whether or not he could purchase products from you at any time?

A. Yes, he has said that——

Q. About when? We would like to fix the time, as nearly as you can remember, Mr. Long.

A. I believe it was in January of this year.

Q. Were any other parties present?

A. No, I don't believe there were.

Q. Did that occur at the station?

A. Yes.

Q. What was said at that time?

A. Well, the particular conversation that we had at that particular time was about tires. He had been handling General tires, and it seems as though the oil company was——

Q. You are talking now about what he was telling you?

A. Yes.

Q. All right. Go ahead.

A. It seems as though the oil company was very much opposed to him handling anything but their own line of tires, and he was in doubt of the extension of his lease if he [fol. 2585] continued with the General tire.

Mr. Somerville: That will be all.

Mr. Paradise: No questions.

The Court: All right. Step down.

(Witness excused.)

Mr. Somerville: The government calls as its next witness Mr. Rayle.

GEORGE RAYLE, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?
The Witness: George Rayle, R-a-y-l-e.

By Mr. Somerville:

Q. Mr. Rayle, where is your residence?
A. Arcadia, California.
Q. What is your present business or employment?
A. I am a salesman for the Quaker State refinery.
Q. The offices of that company are local, are they?
A. In Los Angeles.
Q. What are the particular products that are handled by your company?
A. Oils and greases.
[fol. 2586] Q. Are those Quaker State motor oils?
A. Yes, sir, Quaker State oil and Quaker State grease.
Q. Are you familiar with the Richfield brands of lubricating oils and greases?
A. Some of them. Their gasoline, and I know they have two or three brands of oil.
Q. Are your oils competitive to the Richfield brands of lubricating oils?
A. You mean from the standpoint of price?
Q. Well, I mean——
A. Or quality?
Q. I mean from the standpoint of their uses, their weights, or quality.
A. That's right. I would say they are used for the same purposes, if that is what you mean.

Q. Yes.

A. Their weights, S.A.E. ratings, and where they come from, or where they are manufactured——

Q. No, I think you have answered my question there. I really don't want to develop the particular points of salability, but just if they are comparable products. Are you familiar with the sources from which your company obtains its supply of Quaker State motor oil and greases?

A. I understand they are producers in the Pennsylvania fields, and their head office is in Oil City, Pennsylvania.

[fol. 2587] Q. Do you receive shipments directly from Oil City, Pennsylvania?

A. I am under the impression it is shipped in here to Los Angeles or to the Harbor by tanker, and distributed from this area for the three western states.

Q. What is the particular area in which you make sales?

A. It is Pasadena, Alhambra, Highland Park.

Q. Do you make calls on service station accounts?

A. Yes, sir.

Q. Have you ever made a call on a service station operated by a man by the name of Warren E. Lester, who is located at 416 West Las Tunas, San Gabriel?

A. I believe about a year ago I met the gentleman in a coffee shop across the street from the service station.

Mr. Somerville: May it be stipulated at this time that this station was a leased-out station?

Mr. Paradise: Yes, so stipulated. Leased out by Richfield.

The Witness: He said he had just taken over the service station, or had just taken the lease on this station, and he would like to handle Quaker State.

By Mr. Somerville:

Q. And you were making an effort to sell him, I presume?

A. I asked him why we couldn't sell him a little bit, [fol. 2588] so he tried to explain why we couldn't.

Q. What did he say?

A. He said according to his lease that he wasn't able to handle our merchandise, although he did have customers that would like to have it, and he was bringing up a case

or two at a time from his brother's station in, I believe, Maywood, and just keeping it in his car.

Q. Did he say whether his brother's station was handling Richfield gasoline?

A. No.

Mr. Paradise: I object to that.

By Mr. Somerville:

Q. Do you make any sales to Mr. Lester?

A. No, I do not.

Q. I call your attention to a service station operated by a man by the name of Mr. George Bauer. Are you familiar with this particular station?

A. Yes, I remember.

Q. Located at 2990 East Huntington Drive, San Marino?

A. Yes, sir.

Mr. Somerville: May the record show that the service station at this address, operated by George A. Bauer, is a leased out station, and that Mr. Bauer was a witness in this case earlier in the trial.

By Mr. Somerville:

Q. About when did you first call on Mr. Bauer?

[fol. 2589] A. Well, the first and last time I called on him was May 27, 1950.

Q. At that time did you sell him any Quaker State oil?

A. No. He said that he had purchased some from our driver off of the trucks, and that he had had several cases there on hand, and the supervisor told him that he had to dispose of it one way or another. He said he eventually opened the cans and emptied them into his highboy, Richfield's highboy, in order to dispose of the product.

Q. On instructions from the supervisor?

A. That's what he said, yes, sir.

Q. Did he purchase any more from you at that time?

A. No, he didn't.

Q. Do you recall ever having sold him any after that?

A. No, sir. He said he would like to buy again when the heat was off.

Q. Now, have you ever called at a station operated by

James Battles, at 800 East Valley Boulevard, in San Gabriel?

A. Yes, I did, sir.

Q. About when would that be?

A. I believe it was the same day, May the 27th.

Q. At his station?

[fol. 2590] A. Yes, sir.

Q. Did you go through your usual sales talk with him?

A. Well, Mr. Battles at the time was not, as I recall it, he wasn't in. I talked to one of the boys there.

Mr. Paradise: Now, just a moment, please.

Mr. Somerville: Do we have a stipulation?

Mr. Paradise: Yes, we have a stipulation that this Mr. Battles was an L-O operator at the time.

Mr. Somerville: Yes.

Mr. Paradise: Now, this witness is going to testify to a conversation with someone else.

Mr. Somerville: I will try to catch that. We will stipulate this was a service station operated by Mr. James Battles at the time, and was a leased out station.

Mr. Paradise: Thank you.

By Mr. Somerville:

Q. Now, will you continue?

A. One of the operators that morning said that they weren't able to handle Quaker State, and that they had a few cases on hand, and the supervisor had purchased those three cases, and taken them off the premises, in order to dispose of the merchandise from that corner.

Q. Did you sell him any Quaker State?

A. No, sir.

Q. Did you ever go back to that station?

A. I have never called on him again.

[fol. 2591] Q. Do you recall ever calling on a station operated by Clyde Fisher at 2255 Huntington Drive, San Marino, California?

A. Yes, sir.

Mr. Somerville: May it be stipulated that this was a leased out station at this particular time?

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. About when did you make this call?

A. Approximately the same time.

Q. As your call on Battles?

A. Yes, sir.

Q. Did you sell him anything on that first visit?

A. No, sir, he wasn't sold. He had been sold in the past. He had called in or the driver had made deliveries there. That was my first call on him, though.

Q. Did you have any discussion with him about handling your oil at that time, about whether he could handle it?

A. Well, he said that he was told that he couldn't handle it, according to his lease, and he had several customers that were good gasoline customers that wanted the product, and at the time he did have several cases on hand, which he kept—I believe, as I remember, he said he kept them in Richfield cartons, kept the cans in Richfield cartons so they wouldn't be seen by the supervisor. At the time he said [fol. 2592] he had been told directly by the manager of the Pasadena plant, and he had received his instructions from Los Angeles to not allow us to sell at that particular place or through their leased stations.

Q. And have you sold any since then?

A. No, sir.

Q. Now, there is a service station operated by Robert E. Marty, at 101 Pasadena Avenue, South Pasadena, California. Have you ever called at that station?

A. Yes, sir. I called there at approximately the same time.

Mr. Somerville: One moment, please. May it be stipulated, counsel, that Mr. Marty's station is also a leased out station with the usual type of lease?

Mr. Paradise: So stipulated.

By Mr. Somerville:

Q. About when did you call?

A. I believe it was the same date.

Q. What did Mr. Marty say, if anything, concerning whether he could buy your products?

A. He said he was not able to handle other products

other than Richfield, although he had customers who wanted the product, and at the time he purchased a case for some *particular customer, and he kept it in his car.*

Q. Did you observe what he did with the case?

A. No. Of course, I didn't make the delivery myself. [fol. 2593] He said he would have to keep it in the trunk compartment of his car.

Mr. Somerville: You may have the witness, counsel.

Mr. Paradise: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Let's have a short recess.

(A short recess was taken.)

Mr. Somerville: The government calls Mr. Cleveland.

SIDNEY C. CLEVELAND, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?

The Witness: Sidney C. Cleveland.

The Clerk: How do you spell the first name?

The Witness: S-i-d-n-e-y.

By Mr. Somerville:

Q. Mr. Cleveland, where do you live?

A. I live in Hillsboro, Oregon.

Q. At the present time what is your occupation or employment?

A. Salesman for the Christianson Oil Company, Portland, [fol. 2594] Oregon.

Q. How long have you been with the Christianson Oil Company as a salesman?

A. As a salesman about two years; employed by the same company about seventeen years.

Q. Are you familiar with the products sold by the Chris-

tianson Oil Company and the sources from which it receives those products?

A. Yes, I am, sir.

Q. Does your company distribute petroleum products and automotive accessories that are sold to service station outlets?

A. Yes, we do.

Q. What are some of the oils that your company has handled during the period?

A. Well, we handle Wolfhead motor grease, and Quaker State, and Real Penn motor oil out of Oil City, Pennsylvania.

Q. On your Quaker State oil, where do you receive or where did you receive your supply,—in Portland?

A. Well, the Motor Oil Sales Company in Portland is the distributor, but we received all of our shipments directly out of Oil City, Pennsylvania.

Q. During what period have you handled Quaker State oil?

A. Oh, I presume we handled it from about '44 to about [fol. 2595] '49—'48—'49, I guess it was.

Q. Quaker State products, does that include lubricating oils in the cans? And greases?

A. That included your motor lubricating oils and your greases.

Q. Have you handled MacMillan Ring-Free oil?

A. Yes, we handled MacMillan Ring-Free from Mitchell, Lewis & Staver in Portland. That was shipped from back East. I believe it was out of Arkansas, or Oklahoma, I don't know which.

Q. That is, you ordered it from Mitchell, Lewis & Staver?

A. Yes, sir.

Q. And it was shipped directly from the refinery?

A. Yes, sir.

Q. Now, I believe you mentioned Wolfhead oil. Who manufactures that, and where did you receive it from?

A. That is manufactured by the Wolfhead Corporation of Oil City, Pennsylvania.

Q. And you receive your shipments direct?

A. We receive our shipments direct.

Q. Do you receive any oil manufactured or refined by the Real Penn Oil Company?

A. Yes, we do. The Real Penn Oil Company, under its permit number, of Pennsylvania Motor Oil, and it is handled [fol. 2596] under our brand of "Real Penn."

Q. What brands of greases do you handle other than Quaker State?

A. We handle the Ultra-Fel manufactured by the Battenfeld Oil Company of Kansas City, Kansas.

Q. How do you receive it?

A. We received it direct, and have handled it for approximately 15 years.

Q. Do you know how often, how frequently, you have been receiving shipments of these products during the particular period you have been handling them?

A. Well, at the present, outside of Quaker State, we are not handling the Quaker State any more, but at the time we were handling Quaker State we were handling around one to two cars of either products, a week, of grease or oils. Some of the products were coming in continuously all the time.

Q. Do you know what determines your inventory or the amount you would have available in your warehouse?

A. No, I don't.

Q. What brand of tires does your company handle?

A. We handle the Miller tires out of Los Angeles, and the Brunswick tires out of Los Angeles, and the National tire from the Gates people out of Denver.

Q. And you receive them from each of those locations?

A. From each of those direct.

[fol. 2597] Q. How often do you receive the shipments in cars?

A. Well, at the present day, whenever we can get them.

Q. What is the normal situation? How many do you keep on hand?

A. Well, we keep a complete line, if that is what you mean. We keep a good-sized stock, yes.

Q. As you receive orders from your customers?

A. They are filled, except for the present situation, as it is now.

Q. Do you handle batteries?

A. Yes, we handle the A-C battery. They are manufactured by the States Battery Company of Portland and

Seattle. We receive shipments direct from Seattle when they have had the Portland plant down.

Q. Do you handle any other brand of battery?

A. Yes, we handle the Prest-O-Lite battery out of Oakland, California.

Q. During what period have you handled those batteries?

A. We have handled those, I presume, from approximately 1945 up to the present time.

Q. Are batteries an item that you stock for any considerable length of time?

A. No. We try to keep them on hand a short length of time, so that the battery will not deteriorate.

Q. You are receiving shipments frequently, are you?

[fol. 2598] A. Yes.

Q. Do you handle fan belts?

A. Yes. We handle the Miller fan belts out of California, and radiator hoses.

Q. By "out of California" you mean you receive shipments from California?

A. Yes, from Los Angeles.

Q. Do you handle the usual automotive chemicals, waxes, polishes, and radiator flushes, and the like?

A. Yes, we do, from the Hollingshead Company of Los Angeles, the Whiz products, Motor Rhythm, brake fluid, and similar items, waxes, and so forth.

Q. Do you handle anti-freeze?

A. Yes, we do.

Q. State who manufactures that, and from what sources you receive your shipments.

A. Well, we have different sources we get it from. At the time in regards—well, we were handling Thermo. That comes from back East. I'm not sure, but I think it is from Pennsylvania, and that shipment was directed to us in carload lots.

Q. Would you describe to the court, Mr. Cleveland, the marketing area in which you sell these products?

A. I sell some in my own territory, from Reedville, and down into Astoria, and down the Coast and up into Rose-

[fol. 2599] burg, and from Tigard down the Coast.

Q. How many salesmen does your company employ?

A. Four.

Q. I am talking about the over-all marketing area of the company, not your particular sales area.

A. We handle Oregon and Washington.

Q. Are there ever any instances in which any of the products that you purchase from out of state sources that are received in drop shipments from points other than Portland?

A. You mean shipped direct to some of our accounts?

Q. Yes.

A. Yes, we have.

Q. What products?

A. Oh, we have shipped Miller tires, and Hollingshead Whiz products, and States batteries directly to some of my accounts, such as the Junction Garage at Wallport would be one of the instances.

Q. Now, did you make a sale of any of these products in the State of Washington, where it moved from your warehouse in Portland to the accounts in Washington?

A. It is according to the product they buy, and what quantity they buy,——

Q. Or would that come directly from the manufacturer?

A. —whether it would come directly from the manufacturer or whether it would come out of our stock.

[fol. 2600] Q. Now, with respect to your particular sales efforts, are you familiar with a service station at Reedville, Oregon operated by Frank Ogburn?

A. Yes, I am, a Richfield service station.

Mr. Somerville: I would like the record to show that Government's Exhibits 22 to 22-F are certain agreements between Richfield and R. R. Mathis, and that Mr. Ogburn testified Friday concerning his operation of that station under arrangements with Mr. Mathis, and that it was a 3-C type of outlet.

The Court: All right.

By Mr. Somerville:

Q. About when did you call on this station, Mr. Cleveland?

A. In the early part of June 1949.

Q. And did you sell any products to Mr. Ogburn?

A. Not the first time, no, but the second time I sold——

Mr. Paradise: Now, wait a minute. Forgive me, Mr. Somerville.

Mr. Somerville: Go ahead.

A. The first time, no. The second time, five cases of Quaker State.

Q. When did that occur?

A. That was in the latter part of June.

Q. Did you observe whether or not he displayed that Quaker State oil?

[fol. 2601] A. It was not. It was put in a cupboard in his lube room under lock and key. He said he had to keep it out of sight.

Mr. Paradise: Wait a moment. Object to any conversation with Mr. Ogburn.

By Mr. Somerville:

Q. Did you have any conversation at that time, sir?

A. Yes, we did, sir.

Q. At the station?

A. Yes, we did.

Q. And were there any other parties present?

A. At that time, I wouldn't swear.

Q. None to your memory?

A. Yes.

Q. And what were the conversations at that time?

Mr. Paradise: Objected to on the ground that it is hearsay and immaterial. Mr. Ogburn had no contract, written or oral, with Richfield and he so testified.

Mr. Somerville: If your Honor please, there is no distinction of the principle between this sort of a situation and the situation which existed at a leased out station. The evidence in the record in connection with this particular situation, in connection with Mr. Ogburn's testimony shows that there was——

The Court: I will overrule the objection. We will argue [fol. 2602] the legal effect later. Overruled. Go ahead.

A. Mr. Ogburn placed the Quaker State in his lube room under lock and key in one of the closets, and said he had

to keep it out of sight because he had to handle nothing but Richfield products.

By Mr. Somerville:

Q. Did you subsequently sell some automotive accessories to Mr. Ogburn?

A. Yes. We sold some A-C batteries. They were kept in his station part in a cabinet, down underneath where he kept what Goodyear batteries he had for display. Now, the A-C batteries were not displayed.

Q. Did he say at that time why he would not display the A-C batteries?

A. Yes. For the same reason he didn't display the Quaker State, because it was not handled by Richfield.

Q. Did you at any time receive any instructions from Mr. Ogburn as to the manner in which any deliveries of products from your company would be made to him?

A. Yes, we received——

Q. And when did you receive such instructions?

A. Well, if I remember correctly, it was sometime in July. We had made a couple of deliveries of the Quaker State to his station, and I think it was the second or third time the Richfield representative come in and he was put on, as you might say, the pan. Then we gave our truck [fol. 2603] drivers instructions not to stop there if he saw the Richfield truck or any of their representatives.

Q. You were acting under instructions from Mr. Ogburn?

A. From Mr. Ogburn, that is correct, sir. And then he later gave instructions that everything was to be delivered to his home in Portland and he would bring it out as he needed it.

Q. Did you ever deliver any bulk oil to Mr. Ogburn's home?

A. Yes, we have. It was delivered to his home in five-gallon cans in which he hauled it out to his station.

Q. How many cans?

A. In five-gallon cans, that is, that is not the amount. It was put in five-gallon cans, whatever the quantity was he ordered, so that he could haul it out to his station.

Q. Did you have any discussions with him about displaying tires?

A. Yes. We sold him some Miller tires.

Q. About when did this occur, now?

A. Oh, that occurred around in July of '49. He wanted to handle our tires previous to that, but he kind of held off because——

Mr. Paradise: The question calls for conversation.

[fol. 2604] The Court: Are you telling us what he said?

The Witness: Yes.

The Court: All right.

By Mr. Somerville:

Q. What did he say, sir?

Mr. Paradise: This objection runs to the entire line of testimony.

The Court: Yes, it may be so understood.

A. He said that he wanted to handle our tires because we carried a 15-month guarantee or 15,000 miles on the tire, which Goodyear did not carry, and we gave him a 15 and 2 per cent discount off the key dealer price, whereby he was getting only 2 per cent from Richfield, which was the tire being handled by Richfield. And for a while he did not handle them because he was trying to keep out of hot water, and finally he said he was in there to make a living for himself and he was going to take care of himself and nobody else, and he was going to handle them, but he had to keep them at his home or in his car and then when he got a sale for them, he would bring them down there, the size he wanted, he would bring it from home and fill the order the next day.

Q. Did you notice whether he displayed a Quaker State sign at any time?

A. No, I don't believe he did. If I remember correctly he had had a Pennzoil sign up and Richfield had made so much trouble so——

[fol. 2605] Mr. Paradise: Now, wait a minute.

Mr. Somerville: Wait a minute, now.

Q. You did observe a Pennzoil sign?

A. Yes, I did at one time.

Q. But not all during the period you were contacting him?

A. No.

Q. Did you ever have any discussions with him as to that Pennzoil sign?

Mr. Paradise: Now, that I submit is hearsay three steps farther removed. This is not even this man's product.

The Witness: It will have a bearing, I think, sir.

The Court: Wait a minute. He makes a statement about other products. It is just as effective as to some other products. Go ahead.

A. He carried the Pennzoil sign and they made him take it down. And previous to that I had asked him if he would put our Quaker State sign up, because we figured that with the Quaker State sign up it would bring trade into his station, tourist trade. And he said, "No," he was having trouble over the Pennzoil sign and he would not go for the Quaker State sign because it would still cause more trouble than what he was having.

The Court: All right.

Mr. Somerville: You may have the witness.

[fol. 2606] Mr. Paradise: No questions.

The Court: All right, step down.

Mr. Paradise: We have reserved a motion to strike this gentleman's testimony, as I understood it, your Honor.

The Court: Yes.

Mr. Somerville: Call as the Government's next witness Mr. B. E. Turner.

Bernard E. Turner, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Bernard E. Turner.

Direct examination.

By Mr. Somerville:

Q. Where do you reside, Mr. Turner?

A. Portland, Oregon.

Q. With what company are you presently employed?
A. Christensen Oil.
Q. The same company——
A. The same as Mr. Cleveland.
Q. The same company as Mr. Cleveland testified to. How long have you been employed with Christensen Oil Co.?
A. About five and one-half years.
Q. In what capacities?
A. Well, I have been a salesman for them now about four
[fol. 2607] years.
Q. What particular sales area have you been assigned to?
A. I have the northeast district of the City of Portland.
Q. Do you recall a service station operated by Mr. Ronald Bowe and Harry Daugherty at 8110 North Lombard Street in Portland?
A. I do.
Q. Have you called on that station?
A. I have, sir.

Mr. Somerville: May it be stipulated, counsel, that this is an L-O station, and may the record show that Ronald D. Bowe has testified earlier in this case?
Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. About when did you start calling on this station?
A. Oh, I would imagine it was in the latter part of '48.
Q. At that time to whom did you talk?
A. I talked to Mr. Daugherty.
Q. Did you discuss your products?
A. I did.
Q. Was anything said about the ability of Mr. Daugherty to handle your products?
[fol. 2608] A. Not until he bought.
Q. What did he buy?
A. He bought a couple of cases of Quaker State which he put under the counter.
Q. Subsequently did you have any discussions with anyone concerning his purchasing your products?
A. Other than I asked him about other products which we handle and he said he couldn't handle them. He took

the oil, the Quaker State oil, out of the cases and put them in Richfield cases and put them under the counter.

Q. Did you subsequently make any sales attempts at this station?

A. I sold him just at that time, during the period of time we had Quaker State. I never sold the station again until November of '50, when I did sell him five cases of Peak permanent anti-freeze. Apparently he couldn't get it through his supplier.

Q. Did he tell you that?

A. No, he didn't tell me that, but I would assume that because he was looking for permanent anti-freeze.

Q. Did you ever have any conversations at the station with any Richfield representative concerning this?

A. I did.

Q. Will you describe the circumstances? First of all, when did this occur?

[fol. 2609] A. This happened about, I would say, one year ago. I came into the station not knowing Mr. Bowe, and Mr. Daugherty wasn't there and they had—their supervisor was working the station. It seems, as I recall, one of them was sick and he had taken the place. And I tried to sell him some Quaker State and he told me this representative —I am sorry about the name. He was formerly with Standard Oil. He is not in the same territory now. He has been transferred to another territory, as I understand, but still with them.

Q. The Standard Oil did you say?

A. He had worked for Standard Oil prior to coming to Richfield. And he told me that the company didn't want any of their major stations, their new ones that they were building, didn't want them to handle any outside products. They didn't approve of it. He said he didn't mind so much if I was in some of the small units at the old-time stations. And he introduced himself and told me that he was a representative for the Richfield Oil Company.

Q. Have you generally been successful in stocking your items in that station?

A. In that particular station?

Q. Yes.

A. No, sir. After we quit handling Quaker State I never sold a thing until the present time, when I sold him

[fol. 2610] winter, when I sold him that anti-freeze which was in a little shortage.

Q. Do you recall a service station in Portland operated by Verlin Sheldon at Vancouver and Lombard?

A. I knew him before that. He had a station at 7510 North Lombard. I contacted him in '48. That was a small unit.

Q. Did you make any sales to him at that time?

A. I did, Quaker State.

Q. Did he display that Quaker State?

A. He did not. He kept it behind the door.

Mr. Somerville: It may be stipulated that this station was a leased out station.

A. He did not. He kept it behind the door and under a counter, under a shelf there, rather.

Q. Did you have any discussions with him at that time concerning why he would not display it?

A. He said he couldn't because on the tire deal, when I sold him tires, I brought them out in my own car and took them out and put them in his Nash automobile. He said, "If they are in my car, there will be no questions asked about it."

Q. Did you subsequently attempt to make sales to Mr. Sheldon at Vancouver Avenue and Lombard?

A. I did. Right when he first took over that station we still handled Quaker State and I sold him some at the time. [fol. 2611] When we quit handling Quaker State I never made any more sales. I made attempts to sell him tires after that but I never could make it.

Q. Did you have any conversations with him at this time, at this particular L-O station at Vancouver and Lombard, concerning buying your products?

A. Yes. He told me it was a new station, one of the biggest in the city, one of their best ones, and he couldn't have anything in sight that did not belong to Richfield. However, I did sell him a couple of cases of Quaker State which he kept in the back room there just off the lube room.

Q. Did he ever give you any instructions on the manner in which deliveries should be made?

A. Yes, sir. He bought two-gallon cans——

Q. When did such instructions occur?

A. Right after he had taken over this new station, I would say within about three or four months, which was along in January in '49.

Q. Were there any other parties present?

A. No, sir, there never has been.

Q. What did he say then?

A. He bought twenty cases at two different intervals, as I recall, after he took that station over. I would say it was along in June. Aero Eastern motor oil, and I delivered it to his home. Now, what he did with it I don't know.

[fol. 2612] Q. Did he ever purchase any of your Miller tires?

A. Not at Lombard and Vancouver. He did at 7510 North Lombard.

Q. That was the prior station?

A. That is right.

Q. Did you make delivery of those tires to his station?

A. I did.

Q. Did he ever instruct you concerning where to deliver the tires?

A. He told me to bring them to the station and I put them in the back of his car.

Q. Upon his instructions?

A. That is right.

Q. Did that occur more than once?

A. I believe I made two deliveries to him and that is all. I would say that I sold him in the full length of time that he bought tires from us, I would say probably tires would be about the limit, eight or ten.

Q. At that time did he tell you why he was putting them in the trunk of the car?

A. Yes. He didn't want Richfield Oil to find them.

Mr. Somerville: May the record show that Mr. Sheldon testified earlier in this trial?

Q. I call your attention to the service station operated by Gus Radke at 1205 Northeast Sandy Boulevard in Port-[fol. 2613] land, Oregon and ask you if you have ever called at that station?

A. I have.

Mr. Somerville: May the record show that Mr. Radke testified earlier in the trial and that this was a leased out station that Mr. Radke had, form 542 lease?

Mr. Paradise: So stipulated.

The Court: All right.

By Mr. Somerville:

Q. About when did you first call on Mr. Radke?

A. Along in '48 or '49, until the station was tore down and this new unit put up.

Q. Did you make some sales to him?

A. I did.

Q. Did you make many sales to him?

A. I sold him Quaker State until he left that station. As to how often he needed it, we always kept a supply there for him.

Q. Did he display that oil?

A. He did not. It was in the back room off the lube room.

Q. Did you have any discussions concerning that?

A. Yes. I sold him some batteries.

Q. About when would that be, now?

A. That was along in, oh, the latter part of 1948 or '49.

[fol. 2614] Q. What did he say?

A. He bought value, strictly on price, and he kept those in a room right off the office. He said he couldn't display any of the merchandise because Richfield Oil Company had kind of an office over there, I do believe. That is where a lot of the salesmen met every morning it appeared to me.

[fol. 2615] Q. Now, I call your attention to a service station at 3817 Fourth Plains Road, in Vancouver, Washington, and ask you if you ever called on that service station.

A. That station belonged to Mr. and Mrs. Johnston. Mr. Johnston——

Mr. Paradise: Just a moment.

By Mr. Somerville:

Q. Now, about when did you call on that station?

A. That was in '48 and '49.

Mr. Somerville: The government calls for the documents concerning 3817 Fourth Plains Road, Vancouver, Washington.

Mr. Paradise: We produce in response to the call—where is that in the subpoena, Mr. Somerville?

Mr. Somerville: It would be item 156 of part 1 of the second subpoena.

Mr. Paradise: There were a series of contracts entered into between Richfield and Mr. Howard P. Smith.

I have the original 3-C service station lease, dated April 23, 1946, between Howard P. Smith and Mary Smith, his wife, as lessors, and Richfield, as lessee, covering the property in the city of Vancouver, Washington, there described, which I hand you.

I also have unexecuted copies, I regret—I mean I regret they are unexecuted—of a 3-C operator's lease, dated April 23, 1951, between Richfield, as lessor, and Howard Smith, [fol. 2616] as lessee, for the term commencing May 1, 1951, and continuing to April 29, 1956, paragraph 11 of which states that it is subject to the basic lease, which I have just handed to you, and an unexecuted copy of a 3-C operator's sales contract on Form 783.

I find that I was handing you the wrong contract. May I restate that.

I hand you now 3-C operator's lease on Form 668, print date 11-45, dated April 23, 1946, between Richfield, as lessor, and Howard Smith, as lessee, covering the same property in Vancouver, Washington, commencing May 1, 1945, and continuing until April 29, 1941, and the paragraph 11 of which states it is subject to a basic lease between Howard Smith and wife, as lessors, and Richfield, as lessee, dated April 23, 1948. I believe this instrument which I hand you is dated the same as the original lease on Form 362, that is to say, April 23, 1946.

I also hand you an unexecuted copy of a sales contract, dated April 23, 1946, on Form 783, print date 1-46, between Richfield, as seller, and Howard Smith, as buyer.

I also hand you two instruments, executed between Richfield and Howard P. Smith, both dated October 21, 1948. These are the original instruments, and they are both executed. The first is on a printed form entitled "3-C Operator's Lease," Form 668, print date 9-48, between Richfield,

as lessor, and Howard Smith, as lessee, dated October 21, [fol. 2617] 1948, and for the term commencing November 1, 1948 to April 29, 1951. It covers the same property in Vancouver, Washington, and in paragraph 11 recites it is subject to the original basic lease, dated April 23, 1946, which I have heretofore handed you.

I also hand you an instrument on a printed form called "3-C Operator's Sales Contract" Form 783, with a print date of 8-48, dated October 21, 1948, between Richfield, as seller, and Howard Smith, as buyer, for the period commencing November 1, 1948, and continuing to April 29, 1951.

Mr. Somerville: May it be stipulated that there was in fact an executed agreement as to all of these?

Mr. Paradise: Do you mean that the executed agreements, of which two of those are unexecuted copies, conform to the unexecuted copies, and were executed?

Mr. Somerville: Yes.

Mr. Paradise: So stipulated.

The Court: All right.

Mr. Somerville: Will you mark these, please?

The Clerk: Government's Exhibits 24, 24-A, 24-B, 24-C and 24-D, marked for identification.

(The documents referred to were marked Plaintiff's Exhibits 24, 24-A, 24-B, 24-C and 24-D, for identification.)

[fol. 2618] Mr. Somerville: We offer those documents in evidence, your Honor.

The Clerk: Are these admitted, your Honor?

The Court: Yes, they may be received.

The Clerk: In evidence.

(The documents, heretofore marked Plaintiff's Exhibits 24, 24-A, 24-B, 24-C and 24-D, for identification, were received in evidence.)

By Mr. Somerville:

Q. Mr. Turner, about when did you call on this station?

A. Oh, I would say it was around '48 and '49.

Q. Did you make a number of calls?

A. Yes, sir, while I had that territory.

Q. Did you observe who was operating that station?

A. Yes.

Q. Who was it?

A. Mr. and Mrs. Johnston. However, Mr. Johnston——

Mr. Paradise: Wait a moment, please. Just answer the question.

The Witness: Yes. Mr. and Mrs. Johnston.

By Mr. Somerville:

Q. Those were the people that were actually running the business?

A. That's right.

Q. And did they purchase any products from you?

A. They did.

[fol. 2619] Q. They did during this period that you called on them?

A. Yes.

Q. Did you have any discussions with either Mr. or Mrs. Johnston concerning the ability to purchase your products?

A. Mrs. Johnston——

Mr. Paradise: I object to that on the ground of lack of foundation, immateriality, and hearsay.

The Court: Overruled.

Mr. Paradise: May I be heard on this point, your Honor?

The Court: Yes.

Mr. Paradise: This is different from the Ogburn station and it is also different from the testimony concerning Mr. Ellis, where this objection was partially argued in the record before. That occurred on pages 647 and 654 of the record, and the court will recall that permission was given to further argue that matter.

I think this testimony is of an entirely different character, and the objection to this is of a different nature. Mr. Ogburn, your Honor will recall, testified he was installed at the station by Mr. Mathis, but in the presence of a Richfield commission agent. I think his name was Schwab.

Now, there is no testimony of the relationship between this Mr. and Mrs. Johnston to Richfield; there is a complete lack of foundation. For all that appears to the court, [fol. 2620] Mr. and Mrs. Johnston may have some arrangement with Mr. Smith, the owner and the party to these

3-C contracts, to which Richfield was not a party, and at which no Richfield representative ever appeared.

The Court: That can be brought out on cross examination. Overruled.

The Witness: Well, all I know was what——

By Mr. Somerville:

Q. First of all, would you please help us on this: Fix an approximate time when the conversation occurred.

A. Well, it seems to me it was along in the early part of '49, when they left that station, and Mrs. Johnston told me that they were getting kicked out of that station at the time. Now, I——

Q. Did she say why?

Mr. Paradise: Have you fixed the time of this?

By Mr. Somerville:

Q. What was the approximate time? I didn't quite follow you on that.

A. It seemed to me it was along in the spring of '49. I am a little hazy on the time.

Q. Were there any other parties present?

A. No, they were not.

Q. Other than you and Mrs. Johnston?

A. Mrs. Johnston.

[fol. 2621] Q. Was the occasion of your call a service call?

A. Oh, yes, definitely.

Q. Were you talking about her purchasing your products?

A. Well, that would be why I was there.

Q. Tell us exactly now what she said.

A. She told me that she was in a heck of a fix with Richfield Oil. Now, it could have been through Mr. Smith, too. That is true, he is a contractor next door who owned the property.

The Court: Don't let the lawyers' talk educate you. Just go on and tell the conversation.

A. Well, this——

By Mr. Somerville:

Q. Did she say anything concerning her ability to buy products from you, specifically?

A. No. She said that she would continue to buy.

Q. Did she say anything about whether——

The Court: Well, that is leading, it is terribly leading, Mr. Somerville.

Mr. Somerville: Oh, I am sorry.

The Court: This is important evidence.

By Mr. Somerville:

Q. Was that the total conversation, sir?

A. Sir?

Q. Was that the total conversation?

The Court: You started to tell us something when counsel [fol. 2622] interrupted you. You said she was to be kicked out. Did you finish the conversation?

The Witness: Yes, that is what she told me.

The Court: Did she give you any reasons why she was being kicked out? Did she tell you why?

The Witness: She said she was in the dog house with the Richfield Oil Company supervisor.

The Court: For what?

The Witness: I don't know. She didn't say directly.

By Mr. Somerville:

Q. Did she have competitive items in the station?

Mr. Paradise: I object to that for lack of foundation.

The Court: That is leading. I won't allow that to be pulled out of this man. He is intelligent enough to tell us what took place without guessing. If he has to guess, why, our guess is just as good as his.

Mr. Somerville: Yes, your Honor.

The Court: All right.

Mr. Somerville: I just wanted to be sure we had the full conversation.

Q. Passing now to a station operated by——

The Court: How many more have you got? I thought this witness was going to be short. It is 12:30 now.

Mr. Somerville: This man has a great number of stations.

The Court: All right, we will stop right now. No use [fol. 2623] to go through the entire noon hour, gentlemen. You have made up for time.

(Whereupon, a recess was taken until 2:00 p.m. of the same day, Wednesday, May 23, 1951.)

[fol. 2624] Los Angeles, California, Wednesday, May 23, 1951, 2:00 p.m.

The Court: All right, gentlemen, let us go on.

BERNARD E. TURNER (Recalled).

Direct examination (continued).

By Mr. Somerville:

Q. Mr. Turner, I believe we were talking about a service station operated by Guy Lenton at 4871 North Lombard. Did you make calls on Mr. Lenton?

Mr. DeMartini: Is this an L-O?

Mr. Somerville: It may be stipulated that it was. May the record show that this is the same Mr. Lenton who testified earlier in the trial.

A. Yes, I made calls on Mr. Lenton.

Q. Could you tell us about when you made your first call on that station?

A. I believe it was in '49 that he took that station over. It was a brand-new unit. He opened it up. It was along about the late spring, I believe, that that station was opened up.

Q. Did you make any sales of your products to him?

A. I did.

Q. What were they?

A. Just Quaker State.

Q. Did you have any instructions from Mr. Lenton con- [fol. 2625] cerning the deliveries?

A. Yes. Mr. Lenton told me to bring it out——

Q. At sometime in your initial sales attempt would that be?

A. Well, the first sale I made, he called me at the office and asked me to bring out some Quaker State.

Q. And then did he subsequently have any conversation concerning how deliveries should be made?

A. Yes. He told me to bring——

Q. When did that occur?

A. At the same time he talked over the phone, to bring it out in my own car, that he didn't want the truck out there, he didn't want the Richfield Oil Company to see our trucks on his premises. So I delivered it in my own car.

Q. And did you make any subsequent sales to this man?

A. Just Quaker State. I never sold him anything else.

Q. Did you always make deliveries in the same manner?

A. For the short time he had the station I made all the deliveries, that is right.

Q. Did he display these products, do you know?

A. No, sir.

Q. Did you have any discussions with him concerning display of them?

A. No.

Q. I call your attention now to a service station operated [fol. 2626] by Walter Parcel at 4311 North Vancouver Avenue in Portland, Oregon. Are you familiar with this operator?

A. I am.

Mr. Somerville: May it be stipulated, counsel, that this was an L-O unit?

Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. When did you call on this station, during what period?

A. Oh, during the year of '49, not very often, one or two times.

Q. Did you ever sell him any oil, any bulk oil?

A. Not until April of this year, 1951.

Q. Would you describe the circumstances under which that sale was made? Did you have any conversations with him concerning an order?

A. Yes. I took the order myself and he asked me not——

Q. When did this occur?

A. I would say about April 9th of this year, 1951.

Q. And where were you talking to him, in the station?

A. On the station property. He told me not to deliver on Tuesday, that that was the gas day. He didn't want the truck in there during the same time that the Richfield truck would be there. He told me to deliver it on Wednesday, to bring the truck up and have the barrel dumped over the fence on the other property. There is a hedge there. It [fol. 2627] was over the back of this hedge.

Q. Now, I call your attention to a service station operated by Fred Erz at 630 Northeast Union in Portland. Are you familiar with this particular dealer of this station?

A. I have called on the gentleman.

Mr. Somerville: May it be stipulated, counsel, that this is an L-O unit also?

Mr. DeMartini: Yes, sir.

By Mr. Somerville:

Q. You did call on that station?

A. Yes, sir.

Q. And about when did you make such calls?

A. Oh, that was along in early '49.

Q. And did Mr. Erz buy anything?

A. No, sir.

Q. Did you have any discussions concerning whether he could or could not buy?

A. He told me that he was a Richfield unit and could not.

Q. First of all, did you have such discussions?

A. Well, not necessarily on that line.

Q. Did you have some discussions concerning handling your products?

A. He said he couldn't handle my products.

Q. When did this occur, now?

A. Oh, that was along in, I would say, January or [fol. 2628] February of '49, along in that time.

Q. Had you ever made any sales of your products to this man?

A. I never did. I never called on him again.

[fol. 2629] Q. I call your attention to a service station operated by Robert C. Cooper, at 5040 Southeast Powell in

Portland, Oregon. Have you ever made a call upon this particular operator at this station?

A. Yes, sir.

Mr. Somerville: May it be stipulated, counsel, that this is an L-O unit?

Mr. DeMartini: Yes, sir.

By Mr. Somerville:

Q. When did you make your first call on this station, Mr. Turner?

A. Oh, along in January of '49.

Q. At that time did you endeavor to sell him your products?

A. I did.

Q. Did he buy your products?

A. No.

Q. Did he say why he could not buy your product?

A. He said he was a Richfield unit, and he was using Richfield products, and that was all he wanted to use.

Q. That was all he wanted to use. I call your attention to a service station operated by Ralph Eadus, at 528 Southeast Union, in Portland. Are you also familiar with this particular operator and station?

A. Yes, sir.

Mr. Somerville: May it be stipulated this is an L-O [fol. 2630] unit?

Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. Did you ever call at his station with respect to selling your products?

A. Yes, sir.

Q. About when?

A. Oh, several times in '49 and '50.

Q. Were you able to sell him any of your products?

A. No, sir.

Q. Did you have any discussions at that time concerning whether he could or could not buy your products?

A. Yes, sir.

Q. About when did such discussions occur?

A. Along in '49, the early part.

Q. The early part of '49. At the station?

A. Yes, sir.

Q. What was said by you and by Mr. Eadus?

A. He said that he liked the product and did use it, but he didn't keep it in stock in his station, because Art Lutz, the Shell operator across the street, had it in stock at all times, and he could borrow it from him.

Q. Did you ever make any sales subsequently to this man?

A. Not to him, personally, no, sir.

Q. Did you ever make any sales to any of his help, if [fol. 2631] he had any, at his station?

A. No, sir.

Q. I call your attention now to a service station operated by a Mr. Judd at 82nd and Division Southeast, also in Portland. Do you know this particular man and station?

A. Yes.

Mr. Somerville: May it be stipulated this was an L-O unit?

Mr. DeMartini: And that Mr. Judd was an operator under a form 542 lease?

Mr. Somerville: Yes, sir.

Mr. DeMartini: Thank you.

By Mr. Somerville:

Q. Will you tell the court about when you first called on this station?

A. Oh, that was in '49. It was a Hancock station, and Richfield took it over, and he was the new operator in it at that time.

Q. Did you make your usual sales approach?

A. Yes, sir.

Q. With what result?

A. No result. He didn't buy. He was a new unit and——

Q. Did he discuss why?

A. Well, he said—no, other than that he was a new unit, and he was handling Richfield products, and told me to call back later, which I never did.

[fol. 2632] Q. No further discussion?

A. No, no further discussion.

Q. I call your attention to a service station operated by John P. Locke at 4529 North Interstate, also in Portland. Do you know Mr. Locke, and have you called at his station?

A. Yes, sir.

Mr. Somerville: May it be stipulated that Mr. Locke is a lessee under a Form 542 lease?

Mr. DeMartini: Yes.

By Mr. Somerville:

Q. When did you first call at his station, Mr. Turner?

A. That was—oh, I called on him in '48 and '49.

Q. Were you successful in selling some of your products?

A. No, sir.

Q. At any time did you have any discussion concerning his ability or lack of ability to buy your products?

A. Oh, I have talked to him several times. He was a friend of the man that owns the company I work for.

Q. You talked to him several times. Can you fix some particular time?

A. Oh, it was along, say, in the early part of '49.

Q. What did he say concerning your products?

A. Nothing, or he told me he couldn't see why he should jeopardize himself, why he should handle our products on the outside.

[fol. 2633] Q. Now, I call your attention to a service station operator by the name of Herman H. Eppard, at 6005 North Albina, in Portland. Have you ever called on Mr. Eppard?

A. Yes, sir.

Mr. Somerville: It may be stipulated, counsel, that Mr. Eppard was the lessee of this station under a Form 542 lease during this period.

Mr. DeMartini: Thank you.

By Mr. Somerville:

Q. Has Mr. Eppard ever bought any of your products?

A. Yes, sir.

Q. Has he ever bought any of your oil?

A. Yes, sir.

Q. Does he display this oil?

A. No, sir.

Q. Where does he keep the oil that he has purchased, ordinarily?

A. He has got a locker in the back room where he carries the oil.

Q. Have you ever had any discussion with him concerning the display of your oil?

A. Yes, sir.

Q. When did that occur?

A. Oh, very steadily from 1948 to 1951.

Q. They were all of the same character?

[fol. 2634] A. Yes.

Q. And what did he tell you?

A. He told me that he couldn't keep it in sight, he wasn't supposed to handle it.

Q. Have you ever sold him any batteries?

A. Yes, sir.

Q. Did he display the batteries?

A. Not up until—he never displayed them at all until March of this year, 1951.

Q. Did you ever have any discussion with him concerning his display of those items?

A. Yes, sir.

Q. And when?

A. All along for the last two years or so.

Q. What did he say concerning the batteries?

A. That he had a consigned Goodyear battery through the TBA man, which was Radke, Ed Radke, and he carried our batteries on a shelf back of some cases of Richfield oil, and in March, I believe it was, Radke took the stand and the batteries back, without saying a word to the gentleman. So, in turn, I put a stand and the batteries in there.

Q. The batteries have been on display, then?

A. They are on display now, yes, sir.

Q. I call your attention to a service station operator by the name of Roy A. Winquist, at 6141 Northeast Sandy [fol. 2635] Boulevard, in Portland. Have you ever called on Mr. Winquist?

A. Yes, sir.

Mr. Somerville: May it be stipulated that this is an L-O unit?

Mr. DeMartini: Thank you.

By Mr. Somerville:

Q. Do you recall when you first called on Mr. Winquist?

A. That was about the first part of January, in 1949. He isn't in that station any more, however.

Q. Were you able to make any sales to Mr. Winquist?

A. No, sir.

Q. Did you have any discussions with him concerning his ability to purchase?

A. He was Richfield Oil, and was going to stay that way.

Q. Please, did you have any discussion?

A. Yes. He said—he told me he was using Richfield.

Q. When was that? At the time of your first call?

A. Along in January.

Q. What did he say?

A. He said he was using Richfield products, and he was going to continue to.

Q. Did he say anything further concerning his ability to handle it?

[fol. 2636] A. He may have at that time, I believe. I have forgotten about it.

Q. Did you ever call on a service station operated by Joseph Sunseri?

A. Yes, sir.

Q. At 3138 East Powell in Portland?

A. Yes, sir.

Mr. Somerville: May it be stipulated that Mr. Sunseri was an L-O operator under a Form 542 lease?

Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. When did you make a call on this station,—the initial call?

A. In January or February, '49, it was. I believe it was right in there.

Q. Did he buy any of your products?

A. No, sir.

Q. Did he indicate any interest in your products?

A. Yes, sir, at a later date.

Q. At a later date. Concerning this particular time, did you have any conversation with him concerning whether he could handle your products?

A. Yes, sir.

Q. Would you tell the court exactly what was said in those conversations?

A. He told me that at the present time he couldn't handle [fol. 2637] anything, any outside products, because the station was formerly owned by Archer, and we had a sign on display there of Quaker State. When Richfield had taken over the station and repainted it, he, in turn, leased it, and they had taken the sign and threw it behind the building. I found it there myself. And he said it was taken back there, he didn't say who had done it, that he didn't do it, but he said at a later date he would like to buy Quaker State, but he didn't.

Q. You didn't call on him again?

A. Yes, I did, once or twice, but he was still in a position where he wouldn't buy it.

Mr. Somerville: You may have the witness.

Mr. DeMartini: No questions.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Somerville: The government calls Mr. Sheldon.

Norman Sheldon, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Norman Sheldon, S-h-e-l-d-o-n.

The Clerk: Norman Sheldon. Thank you.

[fol. 2638] Direct examination.

By Mr. Somerville:

Q. Mr. Sheldon, where do you reside?

A. In Arcadia.

Q. California?

A. That's right.

[fol. 2639] Q. What is your present business or occupation?

A. I am handling sales promotion work with the Pennzoil Company in the Los Angeles area.

Q. How long have you been with the Pennzoil Company?

A. About 11 years, with the exception of between March 1949 and April 1950.

Q. Were you ever with the Pennzoil Company in Seattle?

A. Yes.

Q. About when would that be?

A. I started to work in Seattle on about the 28th or 29th day of December 1941 and I was there until November 1946.

Q. What was your capacity during that period?

A. During the first part, the first four years or, that is, until June of 1946 I was a salesman and in June 1946 was made branch manager in Seattle.

Q. Did you subsequently remain with the company after leaving Seattle?

A. Yes. I was transferred to Portland as branch manager down there.

Q. Are you familiar, Mr. Sheldon, with the sources from which Pennzoil products are obtained?

A. Yes.

Q. And those products are lubricating oils and greases, are they?

[fol. 2640] A. That is true.

Q. With respect to the Seattle area how do you receive your shipments of Pennzoil products?

A. The bulk oils are received by deep tanker. They start shipment in Oil City, Pennsylvania, and are brought around by deep tanker. During the war we brought them by tank car from Oil City, Pennsylvania. Our lubricating greases are brought directly from our plant which is in

Vernon in California. This is our grease plant here in California.

Q. What determines the amount of oil that you have on hand at any particular time?

A. We maintain in the Seattle area there a 90-day supply of lubricating oils and in our greases, probably a six months' supply.

Q. What would be the areas supplied by you out of Seattle?

A. Out of Seattle we cover as far north as the Canadian border and as far east as the mountains, and as far south as Kelso.

Q. By the mountains, which mountains do you refer to?

A. I beg your pardon. I believe they call them the Olympic Mountains—or the Cascade Mountains. I am sorry.

Q. Let us go down the coast now to Portland. Would you describe to the court how shipments of Pennzoil products are received at Portland?

[fol. 2641] A. They are received in the same manner, by deep tanker, and our lubricating greases, etc., are from Los Angeles.

Q. What area does the Portland branch of the company supply?

A. We supply all of Oregon, all of the eastern section of Washington, part of northern Idaho, and some counties in northern California. We also make branch shipments out of there to Montana to some of our distributors over in Billings, over in that section.

Q. Would the amount of these products you have on hand at Portland be the same as in Seattle?

A. No, they are quite a bit larger. They would possibly be somewhere in the neighborhood of 10 times as large as those maintained at Seattle.

Q. How frequently do you receive shipments there?

A. Well, shipments of lubricating oils are coming up in the neighborhood of once every month by deep tanker. Our greases were being received possibly every week, depending on the season. In the summertime or in the spring, why, there is more sold than in the winter.

Q. How frequently do you ship from Portland to these areas in Oregon, Washington and Idaho?

A. There are shipments going out of there practically every day of canned oils or greases or some of our products [fol. 2642] going out practically every day.

Q. In connection with your duties in Seattle did you ever make any personal calls on service station outlets?

A. Yes.

Q. Calling your attention to a service station operated by Kenneth Kohl at 1046 First Avenue South in Seattle, do you know Mr. Kohl?

A. Yes, very well.

Q. You have called at his station?

A. Yes.

Q. Do you know whether or not Mr. Kohl purchased any of your lubricating oils and greases?

A. Yes, Mr. Kohl did. He purchased a very large quantity of our lubricating oils and greases, even back prior to his station at 1046 First South.

Q. During what period at this particular station were you making sales to Mr. Kohl?

A. The one at 1046 First South?

Q. Yes.

A. During the years when it first started, when it first opened, which was approximately 1942—I believe it was August or September of '42 when that was opened—and on through until about 1944 we were somewhat restricted during the time that we were selling him. We were restricted.

Q. Were you selling considerable quantities during the [fol. 2643] period from 1942 to 1944?

A. Yes, we were.

Q. You considered it a good account?

A. A very good account.

Q. And what happened in 1944 with respect to the amount of products which he purchased?

Mr. Paradise: (Inaudible to reporter)

The Reporter: I can't hear you, Mr. Paradise.

Mr. Paradise: I asked Mr. Somerville if he wanted to indicate the operation of this station before he went further with his examination of this witness.

Mr. Somerville: It may be stipulated that Kenneth Kohl entered into a 542 form lease with the Richfield Oil Corporation dated August 3, 1942.

Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. In 1944 something happened there with respect to the amount of sales you were making?

A. That is true. In 1944—I don't recall the month exactly—I was called in by Gib Kohl who is Mr. Kenneth Kohl's brother, and he said they were going to be unable to handle——

Q. Called in where?

A. Called in to 1046 First Avenue South, the station. I received a telephone call to come down to see them.

Q. Was this brother of Mr. Kohl's working at the [fol. 2644] station?

A. Yes, that is true. Mr. Gib Kohl suggested that I see Kenny Kohl as soon as he returned from a trip, that he wanted to tell me something regarding the products that were now being handled in his station, and until that time they could not buy any more Pennzoil oils. So as soon as Mr. Kohl returned—Kenneth Kohl I am speaking of—I talked to Kenneth Kohl and he told me in his own words—if I may quote, your Honor?—"Richfield are giving me so much hell I am going to have to stop handling Pennzoil entirely, at least for the time being." So we were forced for some time to deliver just a few cans of oil when he had demand for it, which he hid in Richfield cases. And our highboys that we had loaned Mr. Kohl were put in the back wash racks which were out behind the station and were painted Richfield colors, and Richfield oil put in the highboys. We left them there rather than to pull them out in the hopes some day we could get back in, which eventually we did.

Q. You did while you were up there sell him some more?

A. We sold him some more oil, Mr. Somerville. However, it was kept in the back room and was put in his new garage building which he built behind the service station.

Q. Was that in the same volume as it had been?

A. No. Our volume was cut down considerably.

Mr. Somerville: The Government offers as exhibit next [fol. 2645] in order two documents submitted by Richfield Oil Corporation in response to the second subpoena, II, items 61 and 62, consisting of a sheet marked "INVENTORY K. KOHL 1046 1st Ave. So.," and dated January 27, 1945, and signed by A. Ceccanti, and bearing a penciled notation addressed to "L. H. Bagby" and signed "W. E. Hamilton," dated March 20, 1945.

Mr. DeMartini: No objection.

The Clerk: Is this admitted, your Honor?

The Court: They may be received.

Mr. Somerville: You may have the witness.

The Clerk: That is Government's Exhibit 25 in evidence.

(The document referred to was marked Plaintiff's Exhibit 25 and received in evidence.)

The Court: All right, step down.

Mr. Somerville: The Government calls as its next witness Mr. Plecher.

The Court: I thought you had run out of witnesses.

Mr. Somerville: We have one more, your Honor.

The Court: One more to go, all right.

Ralph W. Plecher, called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ralph W. Plecher, P-l-e-c-h-e-r.

[fol. 2646] Direct examination.

By Mr. Somerville:

Q. Where do you reside, Mr. Plecher?

A. At 1120 South Plymouth Boulevard in Los Angeles.

Q. You are one of the local boys?

A. That is right.

Q. What is your present occupation?

A. I am a salesman for the Arthur A. Haven Co., 1600 South Figueroa.

Q. Would you tell the court the nature of the business that the Haven Company is in?

A. Well, our business has to do with practically everything but the gasoline oil end of it, such as supplies, sundries, accessories, automotive accessories that is.

Q. What automotive accessories that are ordinarily handled at service stations does your company handle?

A. Well, that includes your tires and batteries, spotlights, heaters, fog lights, automobile radios, horns, mirrors, et cetera.

Q. Do you handle tires?

A. Yes, sir.

Q. What brands of tires?

A. Well, we have handled over the period of years the Armstrong line and the U. S. line, the Goodyear line, the Norwalk line.

[fol. 2647] Q. Could you tell us what sources from which you receive your shipments of tires generally?

A. Well, the Armstrong line was the line we handled in largest volume. They have a factory in Des Moines, Iowa, New Haven, Connecticut, and in Mississippi.

Q. Do you handle batteries?

A. A locally made battery under our name, yes, sir.

Q. Do you handle oil filters?

A. Yes, the Campbell line.

Q. From where do you receive them?

A. From Providence, Rhode Island.

Q. Radiator hose?

A. Radiator hose, we handle Norwalk and the Durkee-Atwood line, both made in the East.

Q. Do you receive your shipments directly from the East?

A. That is right.

Q. Do you handle seat covers, automobile seat covers?

A. Yes, sir.

Q. Who manufactures them or where do you receive them from?

A. Well, some are made locally, but our largest supplier has been the Frazier seat cover manufacturing company in Alpena, Michigan.

Q. Do you handle the usual line of automobile chemicals, [fol. 2648] waxes, polishes, radiator flushes and the like?

A. We handle two nationally known lines exclusively, duPont and Simonize.

Q. And from where do you receive your supplies?

A. duPont items are manufactured at Wilmington, Delaware, and the Simonize line, I believe in Chicago, Illinois.

Q. Do you maintain a warehouse locally?

A. We do.

Q. What determines the amount that you have on hand, if anything?

A. We have to predicate the quantities on the anticipated volume of business that we expect to enjoy in the next 30 days to six months.

Q. What is the sales area covered by your company's operations?

A. We cover Texas, New Mexico, Arizona, Southern California and Northern California at present. We did have an outlet in Salt Lake City but we do not have that now.

Q. In your capacity as salesman do you make calls on service station outlets?

A. I do.

Q. Do you recall ever making a call on a service station operated by Paul Grim at 410 Atlantic Boulevard in Long Beach?

[fol. 2649] A. I do.

Mr. Somerville: May it be stipulated, counsel, that Mr. Grim is a lessee under Form 542 lease at that station?

Mr. DeMartini: So stipulated.

Mr. Somerville: And was during the particular time involved?

Mr. DeMartini: Yes, sir.

The Court: When did you first call on Mr. Grim?

The Witness: Well, I believe Mr. Grim came in there sometime in April or May, about 1946.

By Mr. Somerville:

Q. Were you able to make any sales?

A. Yes, I made some sales to Mr. Grim. It was grim doing it, though.

Q. What items did you sell, if you remember?

A. Well, in calling on Mr. Grim I had to go into what we call hot-rod items, such as high-compression heads and dual intake manifolds and chrome-plated carburetors, etc.

Q. Were you familiar with the type of automotive accessories approved by Richfield for Richfield stations?

A. I am.

Q. Were you able to sell any items directly competitive to some of those items?

A. No, sir, I was not.

Q. Did you have any discussions with Mr. Grim con-
[fol. 2650] cerning the fact that he was buying these other hot-rod items, as you referred to them, and not the other type of products?

A. I did.

Q. When did such discussions occur?

A. Well, that was in the first two or three months of his tenancy there, in May, June, and possibly July, 1946.

Q. Did that occur at the station?

A. Pardon me?

Q. Did your discussions with him occur at the service station?

A. At the service station. That is the only place I have ever talked to him.

Q. Were there any other parties present at the time?

A. Not that I recollect.

Q. What did he tell you?

A. Well, he said that inasmuch as he was in a supposedly 100 per cent Richfield account, that he had to buy from their TBA distributor any items that they offered for sale, regardless of the quality or price of it that I offered him for my lines.

Q. Did you discuss price of your products in comparison with the price of the approved items?

A. That is one of the most important things I did. I did discuss price.

[fol. 2651] Q. Did you have any advantage price-wise over them?

A. Occasionally, but he stayed with his instructions.

Q. I call your attention to the same station prior to the time that Mr. Grim was operating it. Did you ever call

at the station prior to that time, when another man was operating it?

A. Mr. J. W. Russell, yes.

Mr. Somerville: May it be stipulated that Mr. Russell was an L-O operator?

Mr. DeMartini: Yes, sir.

By Mr. Somerville:

Q. Did you sell any products to Mr. Russell?

A. Yes. Mr. Russell was a very aggressive merchant, a good dealer. I sold him a very nice volume of goods.

Q. Could you tell the court about when you were making the sales to Mr. Russell?

A. Well, I would say through 1942, possibly '43 and '44.

Q. Did you make any sales to him other than of the hot-rod type?

A. Yes. Mr. Russell bought things pretty well through the line that he could use in his business.

Q. Did your company business with Mr. Russell continue all through his service there at that station?

A. No, I would say from six to eight months before he [fol. 2652] sold out to Mr. Grim that he restricted his buying entirely to items that I might have other than competitive items to him with the TBA setup.

Q. Did you have any discussions with him concerning this change in his practice?

A. Yes. He introduced a new phrase to me. He called the TBA truck "the pie wagon," and said it was impossible for him to purchase further from us items that were offered for sale in the pie wagon.

[fol. 2653] Q. Did he indicate any displeasure or dissatisfaction with your items?

A. No, none whatever.

Q. Did he indicate any satisfaction with your items?

A. Well, he is still in business at another location, and I am still doing business with him.

Q. I call your attention now to a service station in Monrovia, operated by Lawrence Beischel, at 132 East Foothill Boulevard. Do you know Mr. Beischel?

A. Yes, I know Mr. Beischel.

Q. Have you called at his station?

A. Yes, sir.

Mr. Somerville: May it be stipulated that Mr. Beischel is an L-O station operator under a Form 542 lease?

Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. Did you ever do any business with Mr. Beischel at this station?

A. Yes, Mr. Beischel was a pretty good account, starting in about 1935, over the period of years.

Q. At any time did he discontinue buying from you?

A. Yes, he started to taper off about 1940 or '41, I would say, and by 1942 the volume had dropped so that I began to lose interest in making the calls.

Q. Well, as a good salesman, did you make any effort to find out why you were losing business?

[fol. 2654] A. Yes, I did.

Q. Would you tell us what transpired, if anything? First of all, when did any discussion with Mr. Beischel occur?

A. Well, I believe that started about 1940, and at that time——

Q. At the station?

A. At the station.

Q. Would you describe to the court what your approach was, and what his answer was?

A. Well, we had established quite a friendly basis in our business dealings by that time, and I could talk to him a little directly. I said I couldn't see why, as long as I had serviced him for a period of years with satisfactory merchandise, at prices which made it profitable for him, why he couldn't continue. And he told me the Richfield Oil Company had brought pressure to bear and that he would have to purchase items similar to my merchandise from the TBA distributors.

Q. And you never sold him any more?

A. Well, I stayed with the account and sold him various items, but the volume finally became so small that I dropped it.

Q. Did he ever display any of your items?

A. Oh, yes, he displayed them in the business association there. He always displayed them until later on.

[fol. 2655] Q. I am talking now about after this conversation.

A. Not very much, no. He kept them out of sight.

Q. Did he buy items like tires, and batteries, and fan belts?

A. Well, no. Sometimes we had the same lines. In that case he could hang them on the same hook, and get by with it.

Q. By "the same lines" you mean the same products?

A. That's right.

Q. Now, I call your attention, sir, to a service station operated by John Zikratch in Riverside, California, at 4th and Main Streets. Do you know Mr. Zikratch?

A. Very well.

Q. Have you called on this station?

A. For years and years.

Mr. Somerville: Will you stipulate that Mr. Zikratch is an L-O operator under a Form 542 lease?

Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. During what period did you call on this station?

A. Approximately the same period as Mr. Beischel, from about '35 on.

Q. Were you able to sell your products during the years at this station?

A. Yes, in considerable volume.

[fol. 2656] Q. Were you able to continue making sales after the war?

A. No, as—I am still calling on Mr. Zikratch, but it is personally through old friendship and not because the volume makes it worth-while.

Q. Did you ever have any discussion with him concerning why he didn't continue buying since the war?

A. Both Mr. John Zikratch and his brother, Alec, who works for him——

Q. About when did this occur?

A. Oh, from 1946, '47, '48, right on to the present time, still talking about it.

Q. Did he say pretty much the same thing all the time?

A. That's right. And he is about to go about a block or two away into a new station, so it will probably be worse.

Q. What did he say about your products?

A. That he must buy from his TBA distributor.

Q. Now, I call your attention to a service station operated by Perkins and Ederward.

A. Yes.

Q. At Rosemead and Huntington, in San Gabriel, California. Have you called on that station?

A. Yes, I was there yesterday.

Mr. Paradise: Which station?

Mr. Somerville: Perkins and Ederward, Rosemead and [fol. 2657] Huntington.

May it be stipulated that Mr. Perkins has a form 542 lease with Richfield?

Mr. DeMartini: So stipulated.

By Mr. Somerville:

Q. Were you able to sell anything at this station?

A. Well, my association with those boys started at another location in Monrovia in about 1936, and was very satisfactory from a volume standpoint until they came into this new station at the address you quoted, in about 1941.

Q. Did you ever have any discussion concerning the fact——

A. Well, they moved in there, and after they moved in there, why, they weren't so free with their business, and, pressed for an explanation, they told me that Richfield had moved them into a nice new station and they were expected to play ball pretty much with their TBA distributor.

Q. Did you make any calls on this station last year?

A. Perkins & Ederward?

Q. Yes.

A. Yes, indeed.

Q. Were you able to sell any items there?

A. Almost 100 per cent other than items that were obtainable from the TBA distributor.

Q. Did you have any discussion with Mr. Perkins con-
[fol. 2658] cerning buying other items?

A. Yes, I have.

Q. I am talking about the directly competitive items.

A. That's right. Occasionally I met the Richfield distributor there, and we are on the friendliest of terms, but we do not sell the same items, at that station.

Q. What does Mr. Perkins say about buying the other items, if anything?

A. Well, he just says, "I can't do it."

Q. Do you recall ever calling on a station operated by Robert Meeker, at 4301 East Carson, in Long Beach?

A. I do.

Q. During what period?

Mr. Somerville: It may be stipulated that Mr. Meeker has a leased out station.

Mr. Paradise: Under a Form 542?

Mr. Somerville: Yes.

Mr. DeMartini: So stipulated.

The Witness: Well, I believe I contacted Mr. Meeker at that location in about 1949. Prior to that time I had done business with him in Long Beach at another location.

By Mr. Somerville:

Q. Was that a Richfield station?

A. No, that was a General Petroleum.

Q. At this particular station were you able to sell him items that were directly competitive?

[fol. 2659] Mr. Paradise: Which particular station?

Mr. Somerville: At 4301 East Carson.

Mr. Paradise: At the Richfield-owned unit?

Mr. Somerville: Yes, sir.

The Witness: I believe that was under the name of Meeker & Maulding for a time, and then Meeker took it over by himself. They started out there to do business with me like they had at the prior location, with the other oil company, but it didn't last very long. They told me they had to stay with lines that were offered for sale by their TBA distributors, and buy from them.

By Mr. Somerville:

Q. Did you ever make any deliveries to Mr. Meeker, upon his instructions, to any place other than his station?

A. Yes. I think there was some tires and tubes one time that he had me ship to his home, and put in the garage. I think he said he could not have them on the station at all.

Q. I would like to know about when you had any discussions concerning this.

A. Well, that was probably in 1949, or early in '50.

Q. Do you remember what was said at that time?

A. Well, he just couldn't have our brand of tires on the lot, he had to stay with the competitive line.

Mr. Somerville: You may have the witness, counsel.

[fol. 2660] Cross-examination.

By Mr. Paradise:

Q. Mr. Plecher, you mentioned this Beischel station?

A. Yes.

Q. When did you stop calling on him?

A. Well, I haven't called on Lawrence for—I would say that I haven't personally seen him for two years. Occasionally a phone call comes in the store for some item, but I haven't called on him for some time.

Q. During this period that you did call on him, and during the time when he was purchasing your products, was he purchasing accessories only from you?

A. Only from me?

Q. Yes.

A. No, I wouldn't say so.

Q. He was purchasing some from other TBA distributors at the same time?

A. I believe so.

Q. I think you said when Mr. Beischel's volume got low, you stopped calling on him?

A. Yes.

Q. You do consider it good business, don't you, to stop calling on an account and stop soliciting business when the volume gets low?

A. If I can't sell him a in a sufficient volume to make [fol. 2661] it worth-while, I think I can put my time in to better advantage elsewhere.

Q. I think you said your company handles DuPont polishes exclusively?

A. DuPont and Simonize. Those are the only two.

Q. There are other lines of polishes?

A. Oh, yes.

Q. Why do you handle those lines exclusively?

A. Because we have found there are dozens and dozens of lines of polishes that come and go that have more or less of a meteoric rise and disappear, where those two nationally advertised products are constantly sold all the time.

Q. So that you are handling those exclusively at your own desire and wish?

A. That's right.

Mr. Paradise: That is all.
The Court: Any redirect?
Mr. Somerville: No, your Honor.
The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.
Mr. Greer: Mr. Baird, please.

[fol. 2662] Chester F. Baird, called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?
The Witness: Chester F. Baird, B-a-i-r-d.
The Clerk: Chester F. Baird, B-a-i-r-d?
The Witness: That's right.

By Mr. Greer:

Q. Where do you live, Mr. Baird?
A. 540 West Seventh Street, Reno.

Q. Reno, Nevada?

A. That's right.

Q. What business are you in?

A. Automotive Supply.

Q. What company do you work for?

A. Nevada Auto Supply Company.

Q. Speak just a little more audibly, Mr. Baird, so that opposing counsel can hear you. Did you say the Nevada Auto Supply Company?

A. That's right.

Q. How long have you been with that company?

A. Going on six years?

Q. Will you tell the court something of the products [fol. 2663] that that company handles?

A. We handle batteries, tires,——

Q. What kind of batteries do they handle?

A. Exide batteries.

Q. Where do those Exide batteries come from?

A. Out of the San Francisco warehouse.

Q. What kind of tires do you handle?

A. U. S. tires, which are shipped out of Los Angeles.

Q. What kind of fan belts?

A. Raybestos, which come from Bridgeport, Connecticut.

Q. Do you handle oil filters?

A. That's true.

Q. Where do they come from?

A. We handle both Fram and A-C. The Fram come from back East, and the A-C come from Flint, Michigan.

Q. Do those Fram filters come from Providence, Rhode Island?

A. That's right.

Q. Do you also sell any oil?

A. Yes, we do; Quaker State.

Q. And that comes from Pennsylvania?

A. That comes from Oil City, Pennsylvania.

Q. What is the geographic scope of your company's activities?

A. Well, we cover northeastern California, and northern [fol. 2664] and central Nevada.

Q. Now, in the scope of your work as a salesman for that company, do you call on service stations?

A. That's true.

Q. Do you call on any service stations which dispense Richfield gasoline?

A. Yes, I do.

Q. Directing your attention to——

Mr. Greer: I may interject here, counsel, that I am going to talk about stations operated by W. W. Torrey, Les Sawyer, Robert Marsh, and Pete Ellena. Is it stipulated that all four of those are operated under a Form 542 lease?

Mr. DeMartini: It is so stipulated.

By Mr. Greer:

Q. Now, Mr. Baird, directing your attention to the station of W. W. Torrey, have you ever called on that station?

A. I have.

Q. Would you indicate to the court what your sales experience was in calling there?

A. Well, it has been rather good. It has been an average service station so far as volume was concerned.

Q. Do you recall calling on Wayne and Mark Torrey at that station in the month of July, 1949?

A. I do.

Q. Would you tell the court what transpired on that [fol. 2665] visit?

A. Yes, that was about the time I received a letter in regard to the Chevron stations being able to purchase on an open market basis.

Q. Are you referring to the case of United States v. Standard Oil Company of California?

A. That's true.

Q. All right. Go ahead.

A. And we were discussing the proposition of having all things fair and equal on a competitive basis with Standard or Chevron stations from there on, and which would have a bearing against Richfield stations, and the rest of them combined.

Q. When you say "we" do you mean yourself and Messrs. Torrey?

A. Mr. Torrey, that's right; and in the presence of us was Mr. Hunt and a merchandiser of Richfield Oil Company.

Q. Who was Mr. Hunt?

A. Mr. Hunt was the plant manager

Q. The bulk plant manager of the Reno area?

A. Yes, of Reno.

Q. Do you recall any conversation?

A. Yes, I had the copy of the same letter mailed to all the Chervon stations at this time.

Q. The letter mailed by Standard Oil Company?

[fol. 2666] A. Yes, and the quotation of the letter, as it read.

Q. What was your purpose in taking that with you?

A. Well, to emphasize upon them the fact that the market was open on the Chevron stations, and it was no longer tied up.

Q. When you did that, did Mr. Hunt, the Richfield representative, make any statement?

A. Yes. They got quite a, oh, you might say, a "boot" out of it. They kind of laughed it off, and said, "It doesn't mean anything. It is just a matter of process, something they had to go and get done with, and it is all over with, so we will go from here."

Q. Directing your attention to the service station operated by Les Sawyer at 304 West Fourth Street, in Reno, have you called on that station?

A. I have.

Q. What was your experience there?

A. In regard to business?

Q. Yes.

A. Is has been very good.

Q. Did you ever sell him any Quaker State oil?

A. I have.

Q. Did he ever make any statement to you about his handling of that oil?

A. Yes, sir. There was one statement made, oh, in 1950 [fol. 2567] in regard to storing the oil. He was approached by the Richfield bulk plant manager about the fact of the way he stored his oil inside the service station. He stored it under the counter, along with other competitors', but being open 24 hours he left his oil outside. So they told him to move it, and we had just got through the episode of the Standard Oil Company when the letter came through,

and to antagonize this thing, he said, "I don't know what you want me to do with the oil. Would you mind to give me a written memorandum whether you want me to take it home, set it out on the streets, or what?"

Q. Did he say he got a written order?

A. No, he didn't.

Q. Did you ever sell him any oil filters?

A. Yes, I sold him Fram, and he has been buying Fram for about four years, but they have been kept under the counter.

Q. Directing your attention to the service station operated by Robert Marsh at 859 South Virginia Street, have you called on Mr. Marsh?

A. Yes.

Q. Have you sold him any Quaker State oil?

A. Yes.

Q. Where does he keep it?

A. He also kept it under the counter.

[fol. 2668] Q. Directing your attention to the service station unit operated by Pete Ellena, also at 859 South Virginia Street, did you call on him?

A. Yes, I did.

Q. About when?

A. Oh, about in '48, to the last part of '49.

Q. What was your sales experience with him?

A. At the start, very good.

Q. What did you sell him?

A. Sold him Fram filters, Quaker State Oil, and miscellaneous accessories.

Q. Was the volume of accessories you sold him large?

A. Well, to start with, but during the termination of his stay at that station, they began to diminish.

Q. Did you ever ask Mr. Ellena why your sales volume was falling off with him?

A. Yes. He stated, frankly, that what the reason for the drop-off was was the pressure put on him by Richfield, on the fact he wasn't buying enough accessories through his TBA man.

Q. Did Mr. Ellena subsequently cease to be the lessee of that station?

A. He did.

Mr. Greer: May the record show that Mr. Ellena has previously testified in this case.

[fol. 2669] By Mr. Greer:

Q. Now, coming back to the service station operated by Wayne and Mark Torrey, did you call on them about three weeks ago?

A. I did.

Q. What was the purpose of your call?

A. Well, it was just a general sales call, but mainly to sell him some Quaker State.

Q. And what happened?

A. Seemed to be that they had a meeting with the Richfied Oil Company.

Q. Did you have any discussion with Wayne and Mark Torrey themselves?

A. With both Wayne and Mark.

Q. All right. What was said?

A. It was in relationship to the meeting that they had just had with the bulk plant manager.

Q. How did they happen to mention the matter?

A. Because I tried to get a Quaker State order out of them.

Q. All right. What did they say?

A. That they were not supposed to handle Quaker State, Quaker State was not supposed to be on the premises or dispensed. Up to this point you might understand it has been there hidden. Now they don't want it on the premises whatsoever.

[fol. 2670] Q. You started to mention a meeting. Did they mention a meeting to you?

A. Yes, they mentioned a meeting they had with their bulk plant representative or manager.

Q. Did they say when that meeting had been held?

A. No, I couldn't say exactly. It must have been around six weeks ago.

Q. Who called the meeting?

A. The bulk plant manager.

Q. Who attended the meeting?

A. All service station managers or operators up there.

Q. In the entire Reno area?

A. Just Reno.

Q. What instructions did you say were given at this time?

Mr. Paradise: Is this man still talking about his conversation with Mr. Torrey?

Mr. Greer: Yes.

The Court: Yes. Go ahead.

The Witness: The instructions that was given out there at that meeting was to get the off brand oils out, entirely out, nowhere on the premises would they be permitted.

By Mr. Greer:

Q. Did you make any statement concerning their purchase of Quaker State oil?

A. You mean at this particular meeting?

[fol. 2671] Q. Yes.

A. Yes.

Q. What did you tell them?

A. I told them if they ran into any difficulties or any hot water over having the oil, that I would take it off their hands.

Mr. Greer: The witness is with you.

Mr. Paradise: No questions.

The Court: All right. Step down.

(Witnessed excused.)

Mr. Dixon: The government asks that a document returned by the defendant under subpoena No. 2, paragraph No. 2, item No. 65, be marked for identification as Government's Exhibit 9-A.

The Clerk: So marked.

(The document referred to was marked Plaintiff's Exhibit 9-A, for identification.)

Mr. Dixon: The government offers Exhibit 9-A in evidence.

The Court: All right.

The Clerk: Is this admitted, your Honor?

Mr. DeMartini: It is objected to, your Honor,——

The Court: I was waiting for you.

Mr. DeMartini: —as immaterial.

The Court: I will take a look at it.

[fol. 2672] Mr. DeMartini: And on the ground that Mr. Kohl, the party referred to in this letter, was here as a witness, and he resides at Seattle, and was dismissed by the government as a witness.

Mr. Dixon: If the court please, I think this document, if read in connection with Government's Exhibit 9, the relevancy of it will be immediately apparent. The government is not interested in anything beyond the first four sentences in the document, but is offering it only for the purpose of showing the policy in operation as stated and explained in Government's Exhibit 9, and the effect of that policy on the 3-C or 337 type of contract in existence at that time.

The Court: The objection is overruled.

The Clerk: 9-A in evidence.

(The document, heretofore marked Plaintiff's Exhibit 9-A, for identification, was received in evidence.)

Mr. Paradise: I believe the point of the objection was not made fully clear. I think Mr. Dixon's statement highlights the basis of the objection. Mr. Dixon stated that the exhibit is offered particularly in the light of the first four sentences of the first paragraph, as a showing of Richfield's plan or policy.

Now, we submit that there is no foundation on this, [fol. 2673] because this is an extreme and isolated situation. It is not a part of a plan or purpose. This is one of its kind out of 360 stations. Mr. Kohl was subpoenaed by the government, and when he got here from Seattle, he was released. We have no opportunity to show that.

The Court: This is not a statement by Mr. Kohl. It is merely a recommendation of the business manager in regard to that particular account, as an admission against interest, for whatever it may state. This is not Kohl. This is signed by Wilson.

Mr. Dixon: That is a company document.

The Court: No comment.

Mr. Dixon: Sorry.

The Court: Overruled.

Mr. Dixon: In the interests of shortening the trial and

the record, your Honor, and also to make available to your Honor in one document the statistical material which the government requested of the defendant, and which has been submitted to it pursuant to the subpoena served upon it, the government has assembled in one document all of the statistical material so submitted to it by the defendant under 16 paragraphs of the subpoena, which it wishes to offer in evidence.

I, therefore, ask that the compilation as assembled, containing the material submitted to the government under the [fol. 2674] subpoena, be marked as Government's Exhibit 26, for identification.

The Clerk: So marked.

(The documents referred to were marked Plaintiff's Exhibit 26 for identification.)

[fol. 2675] The Court: The offer is directly of a compilation under the rule which arose in the Ninth Circuit, that if the original material is available or is taken from the books of the defendant, then a compilation prepared by anyone may be received either as such, or in case it involves accounts through an accountant who has gone through the original books and made the compilation.

Mr. Paradise: I understand, yes.

The Court: I am making that statement so you understand the basis of the offer.

Mr. Paradise: I understand, your Honor. That is not the basis of our objection.

Mr. Dixon: I have not offered it yet, counsel.

Mr. Paradise: I thought you had offered it.

Mr. Dixon: I just asked that it be marked for identification.

The Court: All right.

Mr. Dixon: The Government represents to the court and to counsel for the defendant that the compilations contained in this exhibit are as taken from the material or the compilations submitted to the Government by the defendant.

I must add, however, that it was the thought of counsel for the Government that this might be submitted as a stipulation. The Government compiled the material which it is now offering and which is contained in this exhibit in

[fol. 2676] its present form to defendant's counsel last Friday. It is my understanding that they did not wish to sign the compilations as prepared by counsel for the Government in the stipulated form. I do not think there is any objection to the accuracy or the correctness of any of the statements that may be contained therein.

The Court: Let us consider that an offer, and let us hear what Mr. Paradise's objection is.

Mr. Dixon: The Government offers it into evidence, then.

Mr. Paradise: If the court please, the Government on May 8th served a subpoena duces tecum on the defendant. In response to the Government's request that the compilations called for by certain items of that subpoena be made in the form of a stipulation, the defendant—I may add, at considerable time and thought—prepared certain statistical data, submitted it to the Government, and was requested to work out a form of stipulation, which was very carefully done. That particular stipulation was submitted by Mr. Dixon and originally submitted at the opening of the trial and is in the custody of the clerk.

It is quite correct, as Mr. Dixon states, that last week he suggested to the defendant that the data that had been included in the stipulation be set forth in a different stipulation and containing different explanatory notes than were [fol. 2677] contained in the defendant's response to the subpoena.

Counsel for the defendant, Mr. DeMartini and ourselves, found it inadvisable on the part of our client to sign the suggested revised stipulation. We have a stipulation with the Government and that is the one that we think should stand before this court.

I may also say that the data contained in the stipulation offered by Mr. Dixon does contain explanatory data that the defendant would not submit in its response to the subpoena.

The Court: All right.

Mr. Dixon: If the court please, as counsel has indicated and for the purposes of shortening the time of the trial, we did work out the form of stipulation that has been referred to by counsel. It was always understood at that time as far as the Government was concerned, that all or none of the

material could be offered by either party to the stipulation at the time of the trial. It was, I think, of definite help to both sides to have this material submitted before we came to the courtroom where we would have to call for a formal return of all of those accounts or all material, which would obviously have encumbered and extended the record.

There is no question here as to the contents of the stipulation. In its original form, as counsel refers to, there were matters contained therein which the Government does [fol. 2678] not offer as part of its case, in the interests of keeping the record as brief as possible. In fact there are compilations in there which your Honor has already ruled are irrelevant and immaterial, namely, any data which relates to sales made, etc., to the uncontracted stations.

The Government therefore very definitely felt that, as part of its case and for the ready access to this material by the court or anyone who might have to subsequently read the record in this case, that it would be of considerable help to have it all in one document.

Now, with reference to the statement made by counsel that we have offered or added some explanatory notes, I wish to say that the only thing which has been added to the form of stipulation that counsel has referred to that is contained in the one that the Government is now offering are such items as refer specifically to the station outlets coming within the three categories, the L-O, the 337, and the 3-C. And your Honor will note by referring to the compilations covering those stations that there is a reference to the fact that the figures given in the compilation by the defendant refer to the type of outlet represented by Government's Exhibits 1 and 1-A through so and so, and 2, when we are dealing with the L-O stations, by reference to Government's 3 and 4 when we are dealing with any compilations dealing with the 337 type of arrangement—I am wrong in that. That is 3-C and 2-B type of arrange-
[fol. 2679] ment. And then the other addition has been made to that data which refers specifically to the 337 or the painting-sales contract type of information. And the sole and only purpose of adding them has been, as I have expressed, to indicate to the court and to anyone who may read the record that that data refers to those types of contracts.

And I have asked counsel specifically as to whether or not they wish to question that fact, or as to whether they wish to amend that language or add anything to it. Government counsel is perfectly agreeable to any change in that part of it.

The Court: I think, gentlemen, that solution of this problem lies in following the rule. The rule which allows compilations to be brought in means that they are what they purport to be, and that is compilations made by a party or a witness from original documents which are before the court. Ordinarily they put a witness on the stand to testify that he has made the compilation.

We have used that rule not only in this type of case but used it in the criminal case. In fact, as I told you before, at this meeting that we had on this antitrust committee I called attention to some of the New York gentlemen to the way we were handling this and they were very much surprised. And I said, "Why, that has been the rule of our [fol. 2680] circuit for a long, long while and we have followed it."

So the basis of the rule is it is a compilation from the original documents which are before the court. I tried an income tax case some two or three months ago, and not only tables there but the press table was littered with books of account extending over a period of years, original entries, and, as I told you before, one of the witnesses brought in a sackful of some 4,000 bank deposit slips. But the Government's experts went on the stand and testified that they had examined those and they made certain particular summaries.

So I think if we follow that rule and identify the original stipulation, merely identify it in the record, then we can receive it as being the original document from which the compilation is made, and this 26 is nothing more than a compilation and you are free to dispute it either in your argument or in the presentation of your case, to object to any comment they may have made that is not necessary by way of explanation. And that solves the problem. That brings that entire thing as the source material above which this cannot rise.

Mr. Paradise: Of course, your Honor, we have no objection on the basis of the compilation. During the defend-

ant's case the defendant expects to offer various accounting compilations. However, I think the court should be aware of this: Any compilations contained in the exhibit [fol. 2681] just offered by the Government are not a summary or compilation of material contained in the stipulation. They are the identical figures, I understand from Mr. Dixon. Mr. Dixon has added other statements we have not submitted in response to the subpoena.

The Court: That is what I say, his comments are mere arguments.

Mr. Dixon: No.

Mr. Paradise: Yes. He said that these are the data that we have submitted in response to the stipulation.

The Court: No, no. A compilation is a compilation, you know, like a bookkeeper or an accountant, he always adds his comment, his gloss. That is a good old word. We will disregard the gloss, that is, the interpretation, and take them for compilations of certain particular facts.

If that is done, then, you see, we can mark the original stipulation and supporting date which were lodged with the clerk on May 8th. We can give them a number. We can call them 26 for identification and then call this compilation 26-A.

Mr. Paradise: If the Government's purpose is as stated by Mr. Dixon, to shorten the record——

The Court: I do not care what their purpose is. I am limiting their purpose.

Mr. Paradise: Oh, I see.

The Court: I am doing the way a cross examiner does. He says, "Don't you mean this?" I did that, I limited them in advance to the purpose and, as so limited, I can see no [fol. 2682] objection.

All right. Then we will change this to 26-A and 26 will be the original exhibit, with the understanding that 26-A is merely a compilation.

The Clerk: 26 and 26-A in evidence.

(The documents referred to were marked Plaintiff's Exhibits 26 and 26-A in evidence.)

Mr. Dixon: May I ask counsel, for the record? I think this is what he refers to, your Honor, and the reason I

am asking this question is that I want to be sure the record is straight on what I am about to ask, otherwise we may have to ask them to produce their witnesses to establish this fact which I am not certain is not in dispute.

The Court: Yes.

Mr. Dixon: That is, that the lease form, for example—do counsel have page 3 before them?

Mr. Paradise: Of the stipulation?

Mr. Dixon: Yes, of Government's Exhibit 26-A, is it, now? The language which we have added, your Honor, which obviously could not be in 26 because that was prepared before there were any exhibits in evidence, is that the data covered in the compilation submitted under Paragraph II is as follows, among other things, and the first and last sentences are taken from the stipulation as originally worked out prior to the trial. The only thing the [fol. 2683] Government has added there is this language:

> "The defendant refers to this type of outlet as an L-O station. The lease form of the defendant on this type of outlet is represented by Government Exhibits 1, 1a to g, inclusive, and by Government Exhibit 2."

Now, I hate to have to call someone from the defendant to establish that fact if it is not in dispute. If it is, I will be glad to do so. But that is added, your Honor, only to explain and tie up the compilation with the Government's exhibits, since the compilation does deal with only Form 542, you see, as is submitted by the defendant, and this is their own language. Form 542 L-O stations is what they referred to. And that is the only change, your Honor, that has been made. I mean of that type from the stipulation as originally drawn.

The Court: I think, gentlemen, there is no dispute at the present time that three types of stations are before the court, the L-O stations, the 337, and the 3-C's.

Mr. Dixon: If that is not in dispute, we do not need——

The Court: Is that in dispute?

Mr. Paradise: That most certainly is not in dispute. We dispute counsel's strained qualification of the L-O stations. There are various print forms of Form 542, all of which are attached to Defendant's Exhibit A. The L-O stations

referred to in Paragraph II that Mr. Dixon refers to cover [fol. 2684] all of those forms and are not limited to the forms of the exhibit that they are talking about.

The Court: No. He said, "this type." He does not say that. He said, "this type," the type that is represented by this form. He does not say it is the only type.

Mr. Dixon: That is right, your Honor.

The Court: I can be an awfully technical judge if you want me to be one.

Mr. Paradise: No.

The Court: You see, I can be very technical in withdrawing this language.

Mr. Paradise: If your Honor please, we are not trying to be technical. We had a stipulation with the Government concerning forms. Mr. Dixon said he wanted to expedite the time of trial, and yet he has spent two days trying to depart from that stipulation.

The Court: Let us not go into that. This has been a very ably conducted lawsuit, gentlemen. I want to congratulate you. You have certainly conducted this with about as little emotion as could be injected into a lawsuit. If I had the assurance that the case which is to follow will have as little emotion, I would be most happy, but I have not. I was nearly a wreck Monday with all the lawyers that were stepping in, just an ordinary antitrust lawsuit. I told them I didn't know what was the matter. Were [fol. 2685] they all suffering from the atmosphere or panic in which we live? I used to try these lawsuits involving millions, and no emotionalism was put in. And we have done very well in this particular case. So I am not going to allow them to tie you to an interpretation. His interpretation, it is like an accountant. For instance, every time you put on an accountant from Price-Waterhouse or a local accountant, you know very well they will give you the data and then they will have a gloss. I tell them to throw the gloss out and give me the data. I will make my own gloss, because it is natural for a person who summarizes to add his own interpretation.

So that is the spirit in which this is accepted.

Mr. Paradise: Thank you, your Honor. I join in your Honor's statement.

Mr. Dixon: May I say for the record, your Honor, that

counsel for the Government has absolutely no intention of any construction being placed upon anything here that would deprive the defendant of showing anything to the contrary or that might even lead to a favorable inference. This is merely descriptive, your Honor.

The Court: Let me make this observation, gentlemen. We are near the end of the Government's case. It seems to me at the present time, at the end of the Government's case, in view of what I stated at the end of the first week, it is much more apparent now, and that is this: That so far [fol. 2686] as the L-O stations are concerned and in view of your contention that you control them and that these men are at no greater power than an employee at will whom you can fire on 24 hours notice, between sunup and sundown, for that matter, it seems to me that the question before the court as to the L-O stations is going to turn into an inerpretation of what the relationship is, whether this nameless relationship is one where control can be legitimately exercised as though you were dealing with your own property, starting with the statment I made in the Standard case, that as to stations which you own yourself, you operate through employees, that the question of keeping anybody else out does not enter into it at all.

So in view of that approach, in view of your own stand in the matter, it makes very little difference how many forms of L-O contracts there were, because you claim the same rights as to all, do you not?

Mr. Paradise: Yes, sir.

The Court: All right.

Mr. Paradise: I appreciate your Honor's laudatory words. Our relationships with Government counsel have been excellent.

Mr. Dixon: We enjoyed it.

Mr. Paradise: I would like to add one more word concerning the last exhibits, however. I think that the Government exhibits should eliminate the two pages, the first [fol. 2687] two pages which purport to be a stipulation and which are not.

The Court: That is right. They should be taken out because you have not signed it. We will disregard the first two pages.

Mr. Paradise: And further, I call the court's attention to the fact that the stipulation itself, there are certain items in it consisting of the portion under the title "IV-B" which relates to uncontracted stations, to which the defendant objects.

Mr. Dixon: That is not in what we offered, counsel.

Mr. Paradise: I am telling what the original shows.

Mr. Dixon: Yes. That is why we did not offer that. This is the Government's record. If we offered that, the court would doubtless reject it.

Mr. Paradise: I am sure it would. I was mentioning—what was the exhibit number of the stipulation, Mr. Childress?

The Court: 26-A?

Mr. Paradise: What I meant was the stipulation, 26. If the court will refer to the data under the title IV-B in the stipulation, the data therein contained refers to uncontracted stations, and the defendant's objection is maintained as to that portion of the data contained in the stipulation.

Mr. Dixon: If the court please, we are not offering that.

The Court: No. You see, that is not in.

[fol. 2688] Mr. Dixon: I do not understand counsel.

The Court: That does not go in. That is merely marked for identification. That is not in evidence.

Mr. Paradise: I see. It is just the stipulation itself.

The Court: What is that?

Mr. Paradise: It is just the stipulation itself which is in evidence.

The Court: Yes. But I mean the data are not offered. I have excluded, on your objection, that fourth group of stations. Of course, I do not want it brought in. If you tried to bring it in the back door I would not let you, either of you, I mean. All right.

Mr. Dixon: If the court please, I just want to be sure that the record is clear on what the material is that the Government has offered. And if the first two pages, of course, are stricken, as they should be——

The Court: The material offered—I will fix the record—are pages 3 to 136 of this compilation, we will call it. You might change the title and call it "Compilation of Material."

Mr. Dixon: All right.

The Court: We strike out the words "Stipulation re Introduction" and say "Compilation of Certain Data." Call it just a "compilation."

Mr. Dixon: May we suggest that added to that be the [fol. 2689] language "Returned by the Defendant under the Subpoena Duces Tecum," so it will be descriptive of the source, your Honor?

The Court: I am leaving the entire thing there. I am just striking out the original words. "Compilation of Certain Data and Evidence Called for from the Defendant in a Subpoena Duces Tecum Dated February 7, 1951, Served on Defendant."

Mr. Dixon: In other words, you are striking the heading.

The Court: Not the heading. I am merely striking two words "Stipulation re Introduction" and calling it "Compilation."

Mr. Dixon: Oh, yes, "Compilation."

The Court: "Compilation of Certain Data."

Mr. Dixon: Yes. Well, that is all right.

The Clerk: The court is working off the title on the blue cover, not the interior portion of the document.

Mr. Dixon: The title is the same, Judge.

The Court: Yes, he knows it. We work like newspaper men. We use a black pencil.

The Clerk: Your Honor, there is one thing that is not clear, though. Government's Exhibit 26 is the stipulation itself, just those few pages, the only thing that is admitted?

The Court: That is in evidence. What is the number of [fol. 2690] that?

The Clerk: That is 26.

The Court: Well, why don't you call that 26——

The Clerk: That has the basic number of 26, your Honor.

Mr. Dixon: That is not what the Government offered into evidence, your Honor.

Mr. DeMartini: I do not think the Government has offered that: We have offered the stipulation part of that.

The Clerk: It was given a Government's number, your Honor, that is why.

Mr. Dixon: As I understand it, your Honor—may I step up to the bench?

The Court: No, no. I have got it.

Mr. Dixon: Your Honor has changed this.

The Court: Let me look at it. I will tell you what we will do. Let us take the stipulation there, by reference, and give it a defendant's number, and that solves the whole problem.

Mr. Dixon: Surely.

The Court: All right: The first four pages of the stipulation, give them a number.

The Clerk: Defendant's Exhibit L.

The Court: That is right. There you are, that settles it all. 26 is merely marked for identification as a source material of the other one. What we have done is just take the book and given it an exhibit number. In that last case [fol. 2691] we had one book and one man could take one page and give it a Government's number and the other, another one.

Mr. Dixon: Pardon me, your Honor, if I try to follow this at this time of the day. I just want to be sure.

The Court: Everything is all right.

Mr. Dixon: I just want to be sure of the physical state of the Government's case.

The Court: If tomorrow you think of something that should be supplied, all right. Everything remains as it is, except we have taken the first four pages of Plaintiff's Exhibit 26 for identification and called them Defendant's exhibit, that is all.

Mr. Paradise: May I suggest for the purpose of the record that the attachments to the stipulation be called another number for identification because——

The Court: No. The whole book is just like you have a bookkeeping book and then take two pages out. Leave it as it is. There will be no confusion then.

Mr. Paradise: I say that because the Government's source data is copied from the attachments to the stipulation.

The Court: That is right, but it excludes the stipulation.

Mr. DeMartini: Is it understood now that our stipulation is in evidence, it has been admitted into evidence?

The Court: That is right, as your exhibit.

Mr. Paradise: Thank you.

[fol. 2692] (The document referred to was marked Defendants' Exhibit L and received in evidence.)

The Court: If you come back tomorrow and find something has been put over, you let me know and we will straighten it out. You do not need it.

Mr. Dixon: I know we do not.

The Court: We have been doing this for 24 years, and Mr. Childress is a very competent clerk.

Mr. Dixon: After Mr. Childress gets it all straightened out, may I look it over, Judge?

The Court: Yes, you may look it over. All right, now what is next?

Mr. Dixon: The Government rests, your Honor.

The Court: The Government has rested.

Mr. Somerville: One more thing.

Mr. Dixon: Pardon me.

Mr. Somerville: May the record show that the Lester and Waugh stations referred to on pages 677-668 are L-O stations, and that the Weston station at 35th and 65th Avenue Northeast, Seattle, mentioned on page 722 is an L-O unit?

The Court: All right.

Mr. Paradise: So stipulated.

Mr. Dixon: I think there are one or two statements in the record, Judge. For instance, I think in the opening statement reference was made to the fact that I said that [fol. 2693] Standard had 11,000 stations, and it was 1100 company-operated stations. I think counsel for defendant may have some suggested changes, too. I do not think it is vital or necessary, but I assume at the end of the entire case such corrections as counsel agree upon for the record may be made with the approval of the court and be corrected, of course.

The Court: All right. Any amendments of fact that appear may be corrected before the case is concluded.

Mr. Paradise: The defendant has some motions to make. Would the court want to hear them now or prefer a recess at this moment?

The Court: I will have a short recess and hear the motions. Are they very long? I was going to continue the case other than the motions. I was going to give you until tomorrow to start the case.

Mr. Paradise: I can present the motions in the morning just as well if you prefer it. One is a motion to strike one

of the instruments that was admitted subject to motion to strike.

The Court: I will tell you, gentlemen. Mr. Childress and I have to work hard on a matter where the deposition is waiting on an order, and instead of counsel writing me, they sent me a telegram and I want the time before the office closes. So really, so long as the Government has rested, we can recess now and he and I can do that. I can [fols. 2694-2697] work later and so can he, but I cannot get the order in before 5:00 o'clock so I really need a little time to do that. Counsel are waiting, their deposition is being held up until I make a ruling on a matter that was heard Monday, and I have to do it in order not to crowd them too much. I need the time before 5:00 o'clock.

So we will adjourn until tomorrow morning at 10:00 o'clock, and then at that time you can begin the presentation of your case and, of course, any motion before you present any evidence that you desire to make may be made at that time.

Mr. Paradise: Thank you.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m. of the following day, Thursday, May 24, 1951.)

[fol. 2698] The Court: All right, gentlemen.

Mr. Dixon: May it please the court, in connection with Government's Exhibit 26-A in evidence, counsel for the defendant have agreed to stipulate that the compilations contained in that exhibit, subject to check by the defendant are those submitted to the government pursuant to the items described in the particular paragraph numbers of the subpoena served on the defendants, as contained in the compilation. Is that right, counsel?

Mr. Paradise: Yes, that is correct, Mr. Dixon. I should mention this, and again not to be technical, your Honor, that was an important phase of the original stipulation, that it was stipulated, and this matter was discussed at considerable length with counsel for the government, that for the purpose of this case only all of the data and statements contained in that—

The Court: Just a moment.

Mr. Paradise: I was going to say that the stipulation is

contained in what I think is Defendant's Exhibit L, and it would be in paragraph 3, and it states:

> "For the purpose of this case only, all of the data and statements contained under the said respective numbers and captions attached to this stipulation and incorporated herein are stipulated to be true."

[fol. 2699] That stipulation, I understand, is still effective as to both exhibits.

The Court: All right.

Mr. Paradise: If the court please, the defendant would like to present, first, a motion to strike a particular exhibit. I believe the exhibit number to which the motion is addressed is Government's Exhibit No. 9.

The Clerk: There again, I do not have the original at the moment. May we have the Government's copy?

(The exhibit referred to was handed to the court.)

The Court: Oh, yes, I remember.

Mr. Paradise: The court will recall that objection was made to the introduction of that letter on the ground of materiality and in that it was remote and had no materiality to this case, that the letter was written thirteen years prior to the date of the commencement of the trial, and there had intervened a war, and conditions had changed. On page 203 of the transcript the court suggested that the defendant might reserve a motion to strike at the conclusion of the government's case, and the question involved is whether or not it has been sufficiently tied up.

We submit, if the court please, that there has been nothing to tie up this particular exhibit by any evidence or testimony before this court.

Now, if the court please, I would like to review the testi- [fol. 2700] mony that has any bearing upon that letter. Mr. King's testimony concerning that appears on these pages of the transcript: On page 130 he testified that defendant's contracts, sales contracts, on Form 337 have been written for a specified quantity, and that the obligation of the dealer is to buy a specified quantity.

On page 135 of the transcript he testified that in 1948 instructions were given that the quantity to be arrived at

was determined by a formula, and that the salesmen were instructed that no dealer was permitted to agree to purchase a quantity in excess of eight-five per cent of his past gallonage experience.

[fol. 2701] There is further testimony between there and page 138 of the transcript, at which point Mr. King testified that the dealer under that type of contract obligates himself to purchase a minimum quantity specified. I will for purpose of clarity mention that Mr. King was referring at that point to the form of 3-C sales contract, the new form of 3-C sales contract, which was adopted by the defendant in the fall of 1948, according to Mr. King's testimony.

The court will recall that on the 3-C stations, the sales contracts prior to that time, between the period of 1945 and 1948, contained a specific obligation on the part of the dealer—and here I am talking about the independent dealers, not the L-O stations,—on the part of the dealer to purchase his entire quantity.

Mr. King also testified, however, later in the transcript, at pages 142-145, that the same practice as to the fixing of quantities on the Form 337 sales contract, which is the other type of dealer station, occurred and that the instructions, first, in 1948 were that the dealer, regardless of his wishes, was not to be permitted to agree to buy a quantity in excess of 85 per cent of his past experience. And subsequently that formula was reduced to 75 per cent as a maximum upon his commitment. He was given a right, of course, to purchase an additional quantity up to a stated maximum. That testimony appears in the transcript on pages 142-146.

[fol. 2702] There was specific testimony concerning split pumps in the transcript at pages 192-205. That, I think, is probably closer to the subject of the relevance and materiality of this particular exhibit. The testimony there, summarized, is briefly this: Commencing on page 192, that a split pump station is one that handles gasoline from more than one supplier. I am summarizing Mr. King's testimony. That in 1938 Richfield had a small number of split pump accounts. Mr. King does not know any stations which are now handling Richfield gasolines and are at the same time handling gasoline of some other suppliers. Richfield in 1937 and 1938 was serving some split pump stations.

That in 1937 or 1938 Mr. King was instructed of Richfield policy "Not to serve such outlets which have split pumps." And that is, of course, consistent with the exhibit which was a letter written in 1938.

Mr. King was asked concerning the policy, the current policy, and he said that Richfield does not solicit the business, and I will quote from the record: "It is not our policy to supply or solicit the business of split pump service stations."

He testified the reason for that policy of current non-solicitation to be the fact that there are probably not over one or two per cent of all service stations on the coast today which are operated as split pump stations. This appears on page 197 of the record.

[fol. 2703] The Court: I remember.

Mr. Paradise: He does not recall—and I think this is important. This appears on pages 204 and 205. He does not recall that those instructions were ever affirmatively rescinded. He said that there was no need to, that the contents and the instructions just became meaningless as time went on.

The only other testimony in the record that could possibly connect this up to the present date could come from three other witnesses. I have examined the record most carefully in this regard. Mr. Nicholson was an ex-employee who was first in the northwest and then he was in Arizona as an assistant manager from 1941 till 1946. He testified that he did have instructions, "I think against split pump accounts in 1937 and 1938." That appears on page 275.

He testified on page 276 that the last instances where there was a practice involving split pump accounts occurred in 1940 and 1941.

In answer to the court's question he made some general statement on page——I do not have the page reference to it, but I can find it—that the policy did not change so far as he knew.

Mr. Nicholson, however, I believe the court will recall, was an unsatisfactory witness. The court mentioned, on page 269, that Mr. Nicholson's recollection appeared to be very hazy. He had difficulty in remembering.

[fol. 2704] The Court: But the point, however, is this: That, assuming there was no evidence indicative of a con-

tinuation of the policy, there is also no proof or evidence of the abandonment of the policy. And it is a fact in the chain of evidence which may be considered in determining what the motivation was for adopting the new system. Because ultimately we are dealing with a type of social legislation where it is very important to determine not only what an act is but what the object was.

So that this fact in the record commends itself to different kinds of argument. The Government may use it as a starting point for the proposition that, having determined not to have split pump accounts, they began to develop these methods which, in themselves, had the identical result, and then argue from there that these methods, both in their form and in their result, achieve the same results.

On the other hand, you can argue from the same facts that that ceased, that you simply were not interested for reasons of your own in split pump accounts and abandoned them, and what they did afterwards should be determined upon an independent basis.

In other words, if we strike this out, then we ought to strike out everything that King testified as to the existence of the policy and its abandonment.

[fol. 2705] So from what you have said, without referring to one or two other items of evidence which would not change the pattern, I am inclined to think that it certainly should not be stricken as an immaterial fact. It is certainly a material fact in the evolvement of the policy which the government complains of.

I agree with you that, this being an equity suit, we are not concerned with what they did in 1938 or 1937. We are interested in what they are doing today. Supposing the policy had been abandoned, nevertheless, as of today, since this is an equity suit and seeks an injunction as to future acts, what they did in the past may be a criterion of what kind of an injunction you are going to direct to it.

It isn't only true of this. It relates to any matter. For instance, in these rent cases that constantly keep coming up, we always have the problem of what type of an injunction to issue, and therefore, we inquire into whether the man still has the property or whether he has changed possession, and also whether he is guilty of other violations than the particular violation involved. In other words, to

determine whether there is such willfulness as to warrant the issuance of an injunction to prevent future action.

So, in view of the fact that this law suit to some extent determines what we should do in the future, and refers to future conduct, I believe that has a very material bearing [fol. 2706] upon the whole issues in the case.

Mr. Paradise: On the court's recognition that this is largely historic back in 1938, that was the reason for the motion. We felt it had not been tied up with testimony and, therefore, it was immaterial.

The Court: As I say, I am not evaluating its importance. That can be done only after all of the evidence is in, but I am just telling you why I think it is a material fact. The motion as to Exhibit 9 will be denied.

Mr. Paradise: The defendant now moves, if the court please, for a dismissal of the action under Rule 41(b), in so far as it pertains to the stations which we have referred to in this case as the independent stations, the 3-C's and the 337's.

The Court: You might as well save your time and my time. There can be no dismissal of a portion of a claim under our procedure. There is no such thing. The government's claim is in one cause of action, and as to any matters on which the government is not entitled to judgment, that can only be done at the conclusion of the case. There is no such thing as a failure to prove. It is like, for instance, if you are trying to prove five elements of damage, and you only prove one, you can prevail at least as to that.

You merely argue later on, if you are satisfied that as to the so-called dealer stations, as we have agreed to call them, there is no showing of control, and then you may argue [fol. 2707] the matter that as to that group the government has failed to show the existence of any monopolistic features.

Mr. Paradise: May I suggest, however, that the government's complaint has particularized in the manner in which the court mentioned earlier, between the two types of stations.

The Court: That is all right, but the complaint is not split. The prayer is as to all, and you cannot split them.

Furthermore, the motion for a non-suit has practically been abolished now, because we are required to make find-

ings. So why should I make findings of a one-sided presentation, when, if I make findings later they would be much stronger, even if I make them in your favor, if I do it on the basis of the conflict of testimony. Our Circuit Court practically canceled the motion for a non-suit even before the amendment to the rules, and because they adopted the absurd California theory of scintilla of evidence. They did it in a case involving me, and I have criticized the case, and I still say they are wrong. That is the Harvey case, and because they used California cases, they arrived at that conclusion, but those cases were cases tried with a jury, and when a judge tries a case without a jury, if at the conclusion of the plaintiff's case he said, "On the basis of the evidence I am satisfied the plaintiff should not recover," he is not going to change his mind if there are two more [fol. 2708] witnesses, but on the scintilla of evidence rule they ruled that way, and they retried the case and the jury decided what I decided. Ultimately the man got a paper victory.

But now they require us to make findings, so that even if your motion were good, I would deny it on the ground that I do not choose to make findings on a one-sided presentation of a case.

Mr. Paradise: Frankly, in making the motion we are basing it on your Honor's decision in the Carew case, in 43 Fed. Supp. But I understand the basis of your Honor's ruling.

The Court: They have changed that ruling. I began that opinion by stating that, fortunately, the scintilla of evidence does not apply here, and I received a compliment from writers in the East that I had the courage to do that, and then the court turned it the other way. In fact, Justice Miller wrote me that and said he was very happy to see that in Decisions California I adopted that theory. He was at that time on the Court of Appeals of the District of Columbia. So I criticized the Court of Appeals, as I have a right to, and just as you have a right, but when it comes to between ten and five, I have to follow them, but after that I do not. I also draw your attention to the fact that if you read the articles on Federal Rules, you will find most of them were speeches that I delivered right in front of them [fol. 2709] at our regular annual meeting. We have an-

other meeting next month, but I am not going to speak at this one.

The motion will be denied. Anything further?

Mr. Paradise: Yes. Before calling our first witness, your Honor, we would like to offer as Defendant's Exhibit next in order a third stipulation between the defendant and the government entitled, "Stipulation Re Introduction of Certain Evidence." May I have this marked first, for identification?

The Clerk: Defendant's Exhibit L, marked for identification.

Mr. Paradise: Not L.

Mr. DeMartini: L was the other stipulation.

The Clerk: That is right. This will be M, for identification. Thank you.

(The document referred to was marked Defendant's Exhibit M, for identification.)

Mr. Paradise: May I call the court's attention to particular provisions of this, for purposes of clarity. The stipulation tabulates and contains various statistical data. Paragraph 2 states that, "All of the data and statements contained under the said respective numbers . . . are . . . true."

Paragraph 3 contains this important qualification, that either party may offer in evidence the data attached and [fol. 2710] contained under the numbers and captions, with this provision, that the data contained under any respective number and caption shall be offered in evidence separately from the data contained under any other number.

Paragraph 4 provides that each party reserves the right to object upon the sole ground of lack of relevance or materiality, and except for such objections so reserved that each of the parties waives all other objections to the introduction of evidence.

Pursuant to the provisions of that stipulation, therefore, —first, may I offer the stipulation itself, the first three pages, in evidence?

The Court: It may be received.

Mr. Paradise: Now, pursuant to the procedure established by the stipulation, may I first then offer the material

under Caption I entitled, "Dates of Incorporation of Defendant And Of Qualification"—

The Court: Now, I will tell you what we will do. If we are going to take several portions of this separately, then you had better give them numbers under M. What would you call this,—M-1?

The Clerk: M-1, sir.

The Court: Then we will call M, for identification, the whole thing. Then we will call M-1 the stipulation.

Mr. Paradise: Good.

[fol. 2711] The Court: That is the first one you put in. What is your next number?

I have got him started now. You see, he is a very good technician. We got through with the memorandum last night at 5:00 o'clock, and he said, "Why don't you let me typewrite it, and that will finish it." So I said, "If you want to work until 5:30, that is all right." So we finished it.

The Clerk: M-1 in evidence.

(The document referred to was marked Defendant's Exhibit M-1, and was received in evidence.)

The Court: What next?

Mr. Paradise: The defendant offers as M-2 the statistical data contained under I, "Dates Of Incorporation Of Defendant And Of Qualification To Do Business."

Mr. Dixon: No objection.

The Court: It may be received.

(The document referred to was marked Defendant's Exhibit M-2, and was received in evidence.)

The Clerk: Just a moment. Will you find that for me?

Mr. DeMartini: I will.

The Court: Come stand with him and give him the number of pages, so that he will know.

Mr. Paradise: The defendant next offers the data under the caption II, entitled, "Date Of Commencement Of Business By Defendant."

[fol. 2712] Mr. Dixon: No objection.

The Court: It may be received.

The Clerk: Defendant's Exhibit M-3.

(The document referred to was marked Defendant's Exhibit M-3, and was received in evidence.)

Mr. Paradise: Defendant next offers the data attached under the Roman numeral III entitled "Comparison of Number of Service Station Outlets."

Mr. Dixon: The government objects to the admission in evidence of the table 2 of that portion of the stipulation.

The Court: I will have to look at it and see what it is.

Mr. Dixon: On the grounds of relevancy and materiality.

The Court: I will take the same attitude I did in the Standard case. I do not think it is material under the theory which I adopted, and which the Supreme Court allowed. However, it is a fact that may be considered. It may well be that the Supreme Court might change its attitude, and adopt the theory that there is a competition within the field, and it doesn't make any difference whether in your own stations you monopolize the outlet and you shut out competition, that they can go to the next fellow. The objection will be overruled.

The Clerk: That is Defendant's Exhibit M-4.

(The document referred to was marked Defendant's Exhibit M-4, and was received in evidence.)

[fol. 2713] Mr. Paradise: As defendant's next, I offer the data under V, entitled "Comparison of Quantities of Gasoline Manufactured."

Mr. Dixon: Wait a minute. You skipped IV.

Mr. Paradise: Forgive me. Defendant next offers the data under IV, entitled: "Comparison of Volume of Gasoline Sold Through Service Station Outlets."

Mr. Dixon: The Government objects to the admission into evidence of table No. 3 contained there.

The Court: The objection will be overruled, subject to the same limitations and purposes.

The Clerk: Defendant's Exhibit M-5.

Mr. Paradise: I presume that the court would prefer to wait until closing argument as to my argument on the relevancy and materiality of the exhibits.

The Court: No, no. I am not saying that. I am changing my mind. I am saying that if the evidence shows that of these stations which you control there was a complete shut-out of their product, it doesn't make any difference that the stations are only three per cent of the stations, because they are monopolistic to that extent. Just as the court said

in the taxicab case, when you monopolize 800 to 300—I forget what it was—that was a monopoly of a segment of the commerce. And the Supreme Court has approved that, so there is no argument about that.

[fol. 2714] I am merely letting them in so as to have them in the record. If you want to make an issue of that, I will strike them out so you have a good point.

Mr. Paradise: I would prefer to argue it at the end of the case.

The Court: Mr. Carlston—I haven't read the article yet but I saw it in the manuscript form—evidently the law school did not want it, because they would have included it in their own law review, so he sent it to me for comity. But his theory is that if there is a choice outside, then there can never be any monopoly.

Supposing I even monopolize 90 per cent of the trade, if the buyer still has 10 per cent to go on, then there is no monopoly. Well, of course, that would mean you could have a 99 per cent monopoly. You could say, why, there is still an open market. You could go to one station. Maybe it is located 10 miles away but it is open to him. He could drive there.

I am not criticizing his attitude because he is a lawyer and also an economist. But I am just saying that we will have to get the Supreme Court to change its attitude, and I do not think that the Supreme Court is going to change its attitude on that subject, and the Congress is not going to, because even the present Congress has shown its intention not to tamper with the antitrust laws. As a matter of fact [fol. 2715] they plugged the hole that the Supreme Court created by the Columbia Steel case, by passing a new law against vertical integration, and it just became law about two or three days ago.

Since, somebody called me up and wanted to know if a man could own two theatres now. I said, "The Government does not prevent you from multiple ownership. But if you shut out a product, then," I said, "the Government comes in."

So I do not want to intimate that I believe it is of any materiality, because that is the argument that the Standard made. But I am allowing it into the record so it will be there. As a matter of fact the Supreme Court, in its

opinion, said that while I considered the matter immaterial, I allowed the fact to go into the record and they were glad it was there because then they could argue on the law of the matter.

Mr. Dixon: The Government also wishes to object to the introduction into evidence of Table No. 4 on that.

The Court: All comparison tables, I will overrule the objection.

Mr. Dixon: I understand, your Honor.

The Court: With the statement I have already made that it is not my intention to change my mind or change the Supreme Court's mind. Incidentally, that decision is not only a five to three, it is a six to three, because Justice [fol. 2716] Douglas in his opinion did not indicate he was concurring or dissenting. He merely wrote a little essay on his interpretation. It was a very beautiful essay, but it had nothing to do with the case before us. He did not say whether it was right or whether it was wrong, and that is all there was before the court. But many good judges do that. One of the finest opinions on free speech is Mr. Justice Holmes' famous dissent in Abrahams against the United States. It is a beautiful thing, beautiful English, and it is a great little treatise on free speech. But when you get through with it you wonder what he thought about the case. What he told us was that such cases should not be brought, but he did not say why the case, as it was brought, should be reversed.

So I do not want the remarks I am making taken as critical of the court. I am merely stating a fact. Besides, this goes right up there if there is an appeal in this case. I want to be careful what I say about the big court.

The Clerk: That is Defendant's M-5.

The Court: All right.

(The document referred to was marked Defendant's Exhibit M-5 and received in evidence.)

Mr. Paradise: Defendant next offers the data attached to the stipulation under the title V, entitled: "Comparison of Quantities of Gasoline Manufactured."

Mr. Dixon: Objected to on the grounds of relevancy and materiality, your Honor, for the record.

[fol. 2717] The Court: Overruled.

The Clerk: Defendant's M-6.

Mr. Paradise: Defendant next offers the data under the title VI, entitled "Comparison of Taxable Sales of Motor Vehicle Fuel."

Mr. Dixon: Objected to on the grounds of relevancy and materiality.

The Court: Yes. Overruled.

The Clerk: That is Exhibit M-7.

Mr. Paradise: Defendant next offers the data under VII entitled: "Number of Competing Companies In Sale of Gasoline," with an exhibit attached to the data.

Mr. Dixon: Objected to on the grounds of relevancy and materiality.

The Court: It may be received. Overruled.

The Clerk: Defendant's Exhibit M-8.

Mr. Paradise: Defendant next offers the data under title VIII, entitled: "Number of Competing Companies In Sale of Automotive Lubricating Oil," with an exhibit attached to that data.

Mr. Dixon: Objected to on the ground of relevancy and materiality.

The Court: It may be received. Overruled.

The Clerk: Defendant's Exhibit M-9.

(The documents referred to were marked Defendant's Exhibits M-6, M-7, M-8 and M-9 and received in evidence.)

[fol. 2718] Mr. Paradise: Defendant next offers the data under the title IX, entitled: "Comparison of Volume of Automotive and Lubricating Oil (Including Grease) Sales."

Mr. Dixon: Objected to on the grounds of relevancy and immateriality.

The Court: It may be received. Overruled.

The Clerk: Defendant's Exhibit M-10.

(The document referred to was marked Defendant's Exhibit M-10 and received in evidence.)

Mr. Paradise: Defendant next offers the data under the title X, entitled: "Comparison of Volume of Tire Sales."

Mr. Dixon: Objected to on the grounds of relevancy and materiality.

The Court: Overruled.
The Clerk: Defendant's Exhibit M-11.

(The document referred to was marked Defendant's Exhibit M-11 and received in evidence.)

Mr. Paradise: Defendant next offers the data under title XI, entitled: "Comparison of Volume of Battery Sales."
Mr. Dixon: Objected to on the grounds of relevancy and materiality.
Mr. Paradise: Defendant next offers—
The Clerk: Just a moment. There is no ruling on that objection.
Mr. Paradise: Pardon me.
[fol. 2719] The Clerk: Is this exhibit admitted, your Honor?
The Court: It may be received.
The Clerk: It is Defendant's Exhibit M-12.

(The document referred to was marked Defendant's Exhibit M-12 and received in evidence.)

Mr. Paradise: Defendant next offers the data under the last title XII, bearing the title "Trends In (A) Population and (B) Motor Vehicle Registrations."
Mr. Dixon: Objected to on the grounds of relevancy and materiality.
The Court: That is Chamber of Commerce advertising. We will leave that in.
The Clerk: Defendant's Exhibit M-13.

(The document referred to was marked Defendant's Exhibit M-13 and received in evidence.)

Mr. Paradise: Defendant calls as its witness—
The Court: I think we had better take our morning recess now and then there won't be a breaking into the continuity of the testimony of any witness. All right, we will take a short recess.

(Short recess.)

[fol. 2720] Mr. Paradise: The defendant calls Mr. King, W. G. King.

W. G. KING, called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct examination.

The Clerk: Just take the stand. You have alread been sworn.

By Mr. Paradise:

Q. Mr. King, you have already been sworn in this action?

The Court: And it is still good, after two weeks.

The Witness: Good morning, your Honor. It is like a vaccination.

The Court: It is still good.

By Mr. Paradise:

Q. Mr. King, just to show your background with the Richfield Oil Corporation, it is my understanding you are presently vice-president and general sales manager, and have been since October, of 1949; that prior to that, and from August, 1946 to 1949 you were assistant to Mr. Dinkins who was the vice-president and general sales manager; and from 1937 to 1946 you were manager of the Richfield southern division; is that correct?

A. Yes, sir.

[fol. 2721] Q. Mr. King, just to establish your experience in the business of marketing petroleum products, how long have you been so engaged prior to 1937?

A. Prior to 1937?

Q. Yes. 1937 was the time of the commencement of business by this company.

A. Approximately nine years prior to that time.

Q. Mr. King, what are your primary duties and functions as vice-president and general sales manager of the Richfield Oil Corporation?

A. I have the responsibility for formulating and approving—not formulating, but approving all policies that

discuss the marketing department operations, all of which come under my direction. I have the final authority on procedures and policies and methods.

Q. All relating to the marketing of petroleum?

A. Exclusively to marketing, yes.

Q. Mr. King, will you describe for the court the organizational set-up of the marketing department of Richfield Oil Corporation, separating first the home office marketing organization from the division marketing organizational set-up?

A. Well, basically, first we have our home office marketing organization or department. In that are a number of individual departments, all having their separate func-
[fol. 2722] tions, such as a real estate department, merchandising department, lubricating sales department, bulk sales department, construction and maintenance, export, and so on.

Q. These are the home office departments?

A. These are home office departments.

Q. Do those departments have any direct contact with service stations either the so-called L-O stations or the independent dealer stations?

A. They have no direct contact. In other words, our divisions carry out all instructions. They, in effect, are the operating people and the only occasion that the home office organizations would have would be where they observe the manner in which policies and procedures are carried out in the field. But it is the responsibility of the divisions to place into execution the policies and procedures as formulated in the home office.

[fol. 2723] Q. Briefly, what are the primary functions and duties of the home office merchandising department?

A. The home office merchandising department has the responsibility of formulating the methods and the procedures that are used in the operation of our leased out service stations.

Q. And briefly, what are the primary functions and duties of the home office real estate department?

A. That department acts in an advisory capacity to me in relation to our purchase or lease of real estate for service station use.

Q. Does that department have any connection with the acquisition of service station properties?

A. No. In each of the divisions we have a division real estate department. They are the people who——

Q. I want to confine this part to the home office functions first, before you give the divisional.

A. No, the home office simply analyzes the propositions that are presented from the divisions. They analyze them and present them to me with various recommendations.

Q. Who is the head of the home office real estate department?

A. H. J. Brower.

Q. What are the primary functions and duties of the home office construction and maintenance department?

[fol. 2724] A. That department has the responsibility of the design, the planning of the various types of service stations that the corporation builds, plus bulk plants and other facilities that are used in marketing. They perform all the drafting, the designing, and formulate the policy which covers the carrying out of our construction maintenance activities in the field.

Q. Relating it primarily to service stations, what are the functions and duties of that department?

A. They direct the activities of the divisions in the building of company-owned service stations and their maintenance and repair.

Q. Is it correct that those three home office departments, merchandising, real estate department, and construction and maintenance, are the only home office departments that have any even indirect contact with service stations?

A. Yes, that is correct.

Q. How many divisions does Richfield have?

A. We operate through three divisions, northern, central, and southern division.

Q. Is the organizational setup of the three divisions comparable? Are they all the same, approximately?

A. The three divisions are all comparable, yes.

Q. Will you describe for us briefly the general organizational setup of the divisions?

[fol. 2725] A. Each division is headed by a manager who is called the division manager, and he has a staff of assistants, such as he may have two or three individuals

whom we call assistant managers in charge of operations, then he will have an assistant manager in charge of merchandising, an assistant manager in charge of real estate, assistant manager in charge of TBA, and construction and maintenance manager.

Q. Taking those separately, what are the functions and duties of the assistant division manager in charge of merchandising, one of those that you mentioned.

A. The assistant division manager in charge of merchandising has the responsibility of directing the operations, exclusively, of our leased out service stations, and he has a considerable staff for that purpose.

Q. Does the assistant division manager in charge of merchandising in any of these three divisions have any functions or duties with respect to any service stations other than the L-O stations?

A. No, he has no responsibility nor has any activity in connection with other than the L-O service stations.

Q. Who are the assistant division managers in charge of merchandising in the three respective divisions?

A. In the southern division, Mr. Burgner, in the central division, Mr. Dusto, and in the northern division, Mr. Chapman.

Q. You also mentioned an assistant division manager [fol. 2726] of operations in each division. Generally, what are the primary functions and duties of that office?

A. The assistant managers in charge of operations, they operate certain designated territories and have under their direction such individuals as branch managers and salesmen in the various categories. And their responsibility is devoted to the solicitation of business in the independent dealer classification and the commercial and consumer classifications.

Q. In the division offices are there such personnel classified as salesmen and merchandisers?

A. Yes. We have that classification of merchandisers and, as contrasted with that, line salesmen and territorial salesmen.

Q. Before we bring down the salesmen, will you first state what are the differentiating factors, if any, between the salesmen, on the one hand, and the merchandisers, on the other?

A. The merchandisers devote their entire time to the operation of Richfield leased out service stations. Our salesmen, on the contrary, have no responsibility for the leased out service stations and their entire time is devoted to the solicitation of business falling in the classifications of independent dealer, commercial and consumer.

Q. You have referred to L-O stations. Would you state [fol. 2727] what is the type of station to which you refer as an L-O station?

A. I refer to those stations that are owned in fee by the corporation, or where both the real estate and the improvements are owned by the corporation, or, second, where the corporation leases the land and erects improvements, or, third, where we have arranged for a property owner to improve the site with a station conforming to our design and specification, which in turn is then leased to the corporation. And I refer to stations that may have heretofore been in operation or have been constructed heretofore that we work out a lease with the owner of the property.

Q. Does Richfield have any L-O station, as you have so defined it, the L-O operation of which is—I will withdraw that. I assume from your answer that there are two basic types of L-O stations, one where Richfield owns the fee itself, and others where it leases either the land or the buildings or both, is that correct?

A. Yes, sir.

Q. In any situation, calling your attention to the second group where Richfield has a lessor and Richfield has a leasehold interest in that particular L-O station, does Richfield have any L-O stations where the L-O operator is the same person from whom Richfield has leased the station?

A. I do not know of any. I do not know of any such [fol. 2728] situation. It would be extremely unusual for such a condition to arise that would involve our taking or leasing a service station property under our customary real estate lease and then turning around and leasing it to the individual and operating it as an L-O station.

Q. To whom do you refer when you speak of an independent service station dealer?

A. We consider an independent service station dealer as an individual who owns his place of business or leases it from others.

[fol. 2729] Q. What is Richfield's connection with such a person?

A. Well, in the normal solicitation of independent dealer business, we endeavor to enter into a contract with those dealers, wherein we will agree to sell them and they agree to buy a specified quantity of gasoline.

Q. Now, going back to the personnel in these division offices, and calling your attention to the particular division of personnel which you have referred to as merchandisers, —by the way, are there more than one classification of merchandisers?

A. Yes. We have individuals that we class as merchandisers. They generally have the responsibility of the operation, or direction and operation, of, oh, as many as 20, 18 or 20 of our leased out stations.

Then there is an individual whom we call the special merchandising representative, who is senior to him, and his responsibility is to direct the activities of four to five merchandisers, and all of this organization are, in turn, responsible to and under the authority of the assistant manager in charge of merchandising.

Q. That is the general line of command, as you have described it?

A. Yes, sir.

Q. Now, what are the duties of the merchandisers, with respect to the subject-matter of the operators of these [fol. 2730] stations?

A. Their duties and responsibilities are to select the desirable individuals as operators for our L-O stations, and after they have been selected, to instruct them and direct them in the company's policies and procedures and instructions, as they relate to the operation of the L-O stations.

Mr. Paradise: May I ask that there be marked for identification an instrument consisting of several sheets, the first of which is a printed form, No. 700, and attached to it is a series of mimeographed pages, entitled, "Work Habits," the first page of which relates to Classification of Branch Merchandiser.

The Clerk: Defendant's Exhibit N, marked for identification.

(The document referred to was marked Defendant's Exhibit N, for identification.)

By Mr. Paradise:

Q. Mr. King, showing you Defendant's Exhibit N, would you state what this represents and—well, just what it represents?

A. Well, in this exhibit there are two documents. One is our Form 700, which is the job classification, which is an analysis of the functions and responsibilities, and the place that the individual occupies in the organization.

Q. To what classification of employee does that particu- [fol. 2731] lar instrument relate?

A. This particular instrument relates to a branch merchandiser.

Q. What uses have been made of the instrument that you have just described, the job classification?

A. All positions in the corporation are so classified. This is to evaluate the position, define its scope, responsibility and authority, as well as the line of authority of the individual occupying it.

Q. Now, has this instrument been issued to branch merchandisers as an outline of their duties or functions?

A. No, this is not issued to the individual. He is acquainted with the contents of it, so as to better acquaint him with the scope of his position.

Q. I am referring to the job classification, not to the Work Habits.

A. That is right.

Q. Yes. Now, would you refer to the other sheets attached to the exhibit and describe what those consist of, and to what purpose they have been put?

A. This sheet is entitled, "Work Habits—Branch Merchandiser," and it is a summary of his duties. It is an outline of the—it is a detailed outline of the work that we expect a branch manager to perform, and his responsibility of directing the operations of our L-O stations.

[fol. 2732] Mr. Paradise: I offer this exhibit as Defendant's next in order.

Mr. Dixon: The government objects to it solely on the

ground of relevancy and materiality, your Honor, for the record.

The Court: Let me see that.

(The document was handed to the court.)

The Court: We have heard so much about the merchandiser, and I think that has a bearing upon his duties and responsibilities, and has materiality. Overruled.

Mr. Paradise: That is the purpose for which it is offered, your Honor, as the background of the organizational set-up.

The Clerk: N in evidence.

(The document, heretofore marked Defendant's Exhibit N, for identification, was received in evidence.)

Mr. Paradise: May I ask that there be marked, for identification, as Defendant's Exhibit N-1 similar instrument relating to territorial merchandiser, as distinguished from branch merchandiser.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit N-1, and was received in evidence.)

By Mr. Paradise:

Q. Directing your attention to Defendant's Exhibit N-1, Mr. King, does this instrument serve the same purposes, [fol. 2733] with the exception that it relates to a different classification of merchandiser?

A. Yes, this serves the same purpose and relates to what we call a territorial merchandiser, who operates in other than what we call salary operated territories.

Q. What are those other than salary operated territories called?

A. Commission agencies.

Q. Would you describe that a little more? Just who are the commission agents, and where do they operate, as distinguished from other territories?

A. We have certain territories wherein Richfield operates a wholesale bulk plant, and where we install an individual we call a commission agent, whose responsibility is the sale and distribution of our products in that territory. That is to be distinguished from our other form of opera-

tion, which we call branch operation, and where the employees are all salaries employees of the corporation.

Q. Calling your attention to Government's Exhibits 6, 6-A, and the group which are entitled "Commission Agency Agreements," are the persons to whom you referred as commission agents the ones who operate under agreements of that nature?

A. Yes. This is a Form 537 commission agency agreement, and that is the form that we use with the commission [fol. 2734] agents.

Q. Are these two forms, the Job Classification and the Work Habits covered by Exhibit N-1, for identification, used the same as you have already described with respect to the forms covering the branch merchandiser?

A. Yes, sir.

Mr. Paradise: Defendant offers Exhibit N-1 in evidence.

Mr. Dixon: The same objection, your Honor.

The Court: Overruled.

The Clerk: N-1 in evidence.

(The document, heretofore marked Defendant's Exhibit N-1, for identification, was received in evidence.)

Mr. Paradise: Defendant asks to have marked as Defendant's Exhibit N-2, for identification, similar instruments relating to Job Classification and Work Habits—Special Merchandising Representative.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit N-2, for identification.)

By Mr. Paradise:

Q. Mr. King, will you state whether the use and purpose of this Exhibit N-2, is the same as you have related with respect to the branch merchandiser and the territorial merchandiser?

A. Yes, it is.

[fol. 2735] Q. To what classification of personnel does this relate?

A. Special merchandising representative.

Q. Are there any differences in the functions and duties

of the special merchandising representative from those of either the branch merchandiser or the territorial merchandiser?

A. Yes. The special merchandising representative is in charge of a small group of either branch merchandisers or territorial merchandisers.

Q. Oh, he is in more——

A. Of a supervisory——

Q. Oh, he is in a supervisory——

A. ——managerial capacity.

Q. And the Job Classification and the Work Habits are similarly used to the others; is that correct?

A. The purposes of the two forms are the same. Naturally, they differ as to contents, because the position is different.

Q. Is it correct that the Work Habits generally constitute the instructions to those classifications, those three separate classifications?

A. Yes, the Work Habits are to guide the special merchandising representative in carrying out his duties in connection with the supervising of the activities of either [fol. 2736] the branch merchandiser or territorial merchandiser.

Mr. Paradise: Defendant offers in evidence Exhibit N-2.

Mr. Dixon: The same objection, your Honor.

The Court: Overruled.

The Clerk: N-2 in evidence.

(The document, heretofore marked Defendant's Exhibit N-2, for identification, was received in evidence.)

By Mr. Paradise:

Q. Now, do all of these three categories of employees that you have referred to, the branch merchandiser, the territorial merchandiser, and the special merchandising representative,—are those the persons you said had to do with L-O stations?

A. Their duties and responsibilities are entirely confined to our L-O service stations.

Q. Now, calling your attention to the personnel in the division which you have referred to as salesmen, will you state what their primary functions and duties are?

A. We have two classes of salesmen, the line salesman and the territorial salesman. I shouldn't confine that to two classes. We have the line salesman, territorial salesman, industrial salesman, and possibly another classification.

Q. Well, which are the salesmen who contact the independent dealer accounts?

A. Those are the line salesmen and the territorial [fol. 2737] salesmen.

Q. What determines whether a particular account is contacted by a territorial salesmen or by a line salesman? Do they work in different types of territories?

A. They work in different types of territories. The line salesman is confined to our salaried branch operation, and the territorial salesman is confined to those territories operated by commission agents.

[fol. 2738] Mr. Paradise: I ask to have identified as Defendant's Exhibit N-3 similar documents relating to line salesmen-branch.

The Clerk: So marked.

(The documents referred to were marked Defendant's Exhibit N-3 for identification.)

By Mr. Paradise:

Q. Mr. King, calling your attention to Exhibit N-3 for identification, will you state whether the purpose and use to which these instruments, that is to say, the job classification and the work habits, respectively, have been put?

The Witness: Just repeat your question, Mr. Paradise.

Mr. Paradise: Will you read it, Mr. Bargion?

(Question read by the reporter)

A. The Form 700, which is the job classification, outlines the scope, duties, functions, and the relationship of this position in the organization to all others. This is the—the one I have here refers to line salesmen.

Q. Is it correct that these job classifications are sent to the division offices primarily for statistical purposes?

A. That is correct, as a matter of instruction to the managerial people in managerial positions as to the scope

and the contents of each of the various jobs in the organization.

[fol. 2739] Q. And the work habits, the use to which the work habits is put?

A. Similarly, the work habits that I have here for branch salesmen is a detail of the work and the manner in which he shall handle his assignment.

Mr. Paradise: Defendant offers into evidence Defendant's Exhibit N-3.

Mr. Dixon: The same objection, your Honor.

The Court: Overruled.

The Clerk: N-3 in evidence.

(The document referred to was marked Defendant's Exhibit N-3 and received in evidence.)

Mr. Paradise: Defendant asks to have marked as Defendant's Exhibit N-4 similar instructions, both job classification and, on separate sheets, work habits relating to territorial salesmen as distinguished from line salesmen.

The Clerk: So marked.

(The document referred to was marked Defendant's Exhibit N-4 for identification.)

By Mr. Paradise:

Q. Handing you Defendant's Exhibit N-4 for identification, Mr. King, will you state if the use to which those two instruments are put is the same as you have already testified concerning line salesmen?

A. Yes, these are the same and apply to territorial salesmen.

[fol. 2740] Q. And the difference between territorial salesmen and line salesmen solely pertains to the type of territory in which he operates, is that correct?

A. Yes, sir.

Mr. Paradise: Defendant offers Exhibit N-4 for identification into evidence.

Mr. Dixon: Same objection, your Honor.

The Court: Overruled.

The Clerk: N-4 in evidence.

(The document referred to was marked Defendant's Exhibit N-4 and received in evidence.)

The Court: I think this is a good time to stop, gentlemen. We have Judge Weinberger from San Diego visiting us and I promised, for a change, to go to lunch with the judges and they are waiting for me. All right, 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Thursday, May 24, 1951.)

[fol. 2741] Los Angeles, California, Thursday, May 24, 1951. 2:00 p.m.

The Court: Proceed.

W. G. KING, called as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct examination (Continued).

By Mr. Paradise:

Q. Mr. King, before we leave the subject of salesmen and merchandisers, would you state how many salesmen there are, and I am speaking of the aggregate in all three divisions?

A. Approximately 75.

Q. What is the aggregate number of merchandisers in all three divisions?

A. Approximately 110.

Q. Now, does that latter number include both the branch merchandisers and special merchandiser representatives?

A. All classifications of merchandising representatives.

Q. Is the authority to enter into agreements made the subject of a written authorization?

A. Yes.

Q. A written delegation of authority?

[fol. 2742] A. That's right.

Mr. Paradise: I ask that this instrument entitled "Chart of Authorized Signatures," showing a revision date 1-1-51, be marked for identification.

The Clerk: Defendant's Exhibit O, marked for identification.

(The document referred to was marked Defendant's Exhibit O, for identification.)

By Mr. Paradise:

Q. Mr. King, I show you Defendant's O, for identification, and ask you to state what that represents.

A. This is what we call our chart of authorized signatures for the marketing department. It lists all printed documents, whether they be contracts, leases, rescissions, of printed forms that are in use in the marketing department, and it designates to whom authority has been given to execute these agreements.

Q. Now, which agreements referred to in this chart of three pages are the agreements pertaining to service stations, or would you tell me under which category the service station agreements are classified?

A. They come under category H, "Leases, contracts, and agreements."

Q. Will you explain what these numerals and symbols mean in the right-hand column of that chart?

[fol. 2743] A. Well, if you refer to the third page, you will see a list of those people in the marketing department who are authorized to execute these various agreements, and the numbers that appear in the column here are keyed to that group of individuals.

Q. I would like to ask you a question concerning page 3. There is a note there with two asterisks, and it states following that identification, "Approval of one, two, three or four required," and said paragraph (a) is, "When the agreement contains unauthorized alterations or insertions in conflict with the printed proviso or form, or in violation of established company policy." Will you state the purpose of that provision?

A. That provision, that requires that any of the forms that we use under category "H" that may be altered in any form or fashion, require that the person normally delegated the responsibility of executing them cannot do so,

and they must be referred to me personally or to three of my personal nominees.

[fol. 2744] Q. Let me see if I understand that. That if there are any deviations from the printed form, none of your subordinates have authority to sign them unless they are referred to you?

A. That is right.

Q. Or to designate members of your staff?

A. If there is any change whatsoever in the printed form of our contracts, then they must be referred to me personally or to these designated three individuals whom I have appointed here, to authorize their acceptance or rejection.

Q. Who are those three persons?

A. Mr. Mayfield and Mr. Hutchinson, who are my assistants, and Mr. Nelson who is my chief clerk.

Q. And they are members of your home office marketing staff in the executive office?

A. That is right.

Q. These printed forms that you refer to, by whom were those prepared?

A. Those printed forms are all prepared by our legal department.

Mr. Paradise: Defendant offers Exhibit O in evidence.

The Court: It may be received.

Mr. Dixon: Our usual objection, your Honor, for the record.

The Clerk: Counsel has objected. Is this admitted, your [fol. 2745] Honor?

Mr. Dixon: Yes. It has been overruled.

The Court: What is it, the same objection?

Mr. Dixon: The same objection, your Honor.

The Court: Let's see. When we had the Standard case here we numbered the objections by number so as not to repeat them. We had No. 1, No. 2, No. 3, you see. All right, gentlemen, objection will be overruled.

The Clerk: O in evidence.

(The document referred to was marked Defendant's Exhibit O and received in evidence.)

The Court: This is off the record.

(Brief discussion outside the record)

The Court: Is this my copy?

Mr. Paradise: I merely gave you that for illustration.

The Court: Is this an extra copy you want me to keep, or is that an exhibit?

The Clerk: It is separate from the exhibit. Defendant's Exhibits O-1 and O-2 marked for identification.

(The documents referred to were marked Defendant's Exhibits O-1 and O-2 for identification.)

By Mr. Paradise:

Q. Mr. King, that chart of authorized signatures have there been prior issuances of a chart of authorized signatures?

A. The chart of authorized signatures has been in effect [fol. 2746] ever since the inception of the company.

Q. It appears that the revisions are largely in the alteration of form numbers and the personnel authorized to sign, is that correct?

A. That would be about the only changes, the individuals as they may change from time to time, and the forms as they may change.

Q. I show you Defendant's Exhibits O-1, which is a chart of authorized signatures dated March 1, 1941, and Defendant's Exhibit O-2, which is a similar chart dated February 15, 1939, and ask if those are the ones to which you refer?

A. Yes, they are.

Q. Do those forms also contain the provision concerning alteration of forms and limitations on authority of your subordinates to sign contracts?

A. They do.

Mr. Dixon: You mean other than are contained therein?

The Witness: I did not hear you, sir.

Mr. Dixon: Other than are contained in your exhibit?

Mr. Paradise: No. The defendant offers O-1 and O-2.

Mr. Dixon: The same objection. Do you have a copy of that, counsel, so we can follow it?

Mr. Paradise: Yes, I will furnish that to you right away.

[fol. 2747] The clerk: O-1 and O-2 in evidence.

(The documents referred to were marked Defendant's Exhibits O-1 and O-2 and received in evidence.)

By Mr. Paradise:

Q. Except as set forth in those charts of authorized signatures, Mr. King, has any authority to enter into any contracts, agreements or understandings, either written or oral, binding on Richfield Oil Corporation been given or delegated to any person in the Richfield marketing department?

A. No authority has been delegated to any person in the marketing department to enter into any agreement on behalf of the company other than on the printed forms that are listed in that chart, including any oral agreement.

Q. Does any subordinate of yours in the Richfield marketing department have authority to enter into any oral agreement?

A. No, sir.

Q. Binding upon the Richfield Oil Corporation?

A. No, sir.

Q. Has any authority been granted to the commission agents whom you mentioned this morning to enter into any contract or agreement or understanding binding on Richfield?

A. No, sir.

Q. That is to say, either written or oral?

A. Yes, sir.

[fol. 2748] Q. By "yes" you mean you understand my question?

A. I do. In other words, to answer your question, the commission agent is not authorized to enter into any agreement, oral or written, on behalf of the company.

Q. These exhibits, these charts of authorized signatures, in the portions relating to the division offices refer to authorized signature of the service station documents by division managers and chief division clerks or division chief clerks. Are there any other personnel in the three division offices who have authority to sign any contracts or agreements in Richfield's name or on Richfield's behalf?

A. None other than the division manager and his chief clerk, and then only when there is no alteration in the document.

[fol. 2749] Q. Has any authority ever been given to any salesman or merchandisers to enter into any agreements on Richfield's behalf?

A. No, sir.

Q. Written or oral?

A. Written or oral.

Mr. Paradise: May I have Government's Exhibit 1-E?

By Mr. Paradise:

Q. Mr. King, I will show you the printed form, which is Government's Exhibit 1-E, which is entitled, "Form 542. Richfield Oil Corporation Service Station Lease," with a print date of February 2, 1944, and ask you if that is the form of instrument that is used between Richfield and the operators of Richfield's L-O stations.

A. It is.

Q. Now, who are authorized to sign that form on Richfield's behalf, that is to say, assuming that there were no alterations in the printed form?

A. The division manager or his chief clerk.

Q. Is there any agreement between Richfield and the L-O operator, that is to say, the operator of the L-O station, to which this pertains, other than what is contained in this form of lease?

A. There is no other agreement, written or oral.

Q. What is the practice which is followed, if there is a uniform practice, in respect to the time at which this [fol. 2750] 542 form is signed by the prospective or incoming operator in one of Richfield's L-O stations?

A. After an operator has been selected and has been told or been instructed in the manner of the operation of the station, and what Richfield expects him to do, then Form 542 is reviewed with him, and at that time the operator executes or signs the agreement, which is then forwarded to the division office for acceptance and execution.

Q. I think you referred in your testimony, when you were called as a witness by the government, to the things that an operator is expected to do and told to do, and I don't cover that same ground.

Now, is the practice uniformly followed, of having this

prospective operator sign a form 542 before he is installed in the station?

A. That is our practice.

Q. I believe you described this morning the four different categories or types of Richfield L-O stations. Would you tell me, Mr. King, what is Richfield's reason for having or acquiring L-O stations?

Mr. Dixon: If the court please, I object to that question as immaterial.

The Court: Overruled.

The Witness: Richfield has found from experience through the years that it cannot depend upon a sufficient [fol. 2751] volume of business derived through independent dealers to maintain a stable market for its production.

I might point out that the market for gasoline is represented probably by 75—I would like to point out, rather, that about 75 per cent of the market for gasoline is resale, and the balance is represented by commercial and consumer accounts, as well as various subdivisions of the government.

Richfield found that with the intense competition for the independent dealers' business, and the rate of turnover, that it could not depend upon that group as offering a stable market for its product.

By Mr. Paradise:

Q. Stability of outlet, then, is the prime factor? Do I properly understand your answer?

A. Stability, and in order to find a market for its products.

Q. Has it been Richfield's experience that sales account contracts, which it has had with independent dealer stations, to which you referred, have been lost from time to time?

Mr. Dixon: I object to that, your Honor, as being wholly irrelevant and immaterial.

The Court: Overruled.

The Witness: As I have mentioned, there is intense competition for the business of the independent dealers, [fol. 2752] and Richfield is constantly losing accounts in that category to competition.

By Mr. Paradise:

Q. Does Richfield continue to solicit business of that sort?

A. Naturally. Richfield salesmen and representatives are continuously soliciting business in that category.

Q. Has Richfield's needs for service station outlets, as you have described it, increased or decreased during the past ten-year period?

Mr. Dixon: I object to that as irrelevant and immaterial, your Honor:

The Court: Overruled.

The Witness: Richfield's need for additional outlets has greatly increased, particularly in the post-war period.

By Mr. Paradise:

Q. Would you describe what, in your opinion, have been the chief factors that have caused such increase of need for service station outlets?

A. Richfield found itself in a very precarious situation following the end of the last world war. I——

Mr. Dixon: If the court please, I think that is a rather broad statement. I do not wish to object, if your Honor feels it proper, but I think that statement is obviously inappropriate, and is strictly the conclusion of this witness, the precarious position——

The Court: State facts. We are not held by generaliza-
[fol. 2753] tions. Tell us what the situation was that existed.

By Mr. Paradise:

Q. Have there been, Mr. King, certain specific factors which have contributed to Richfield's increased need for service station outlets?

A. Yes.

Q. Will you recite what those have been?

A. At the end of the last war, Richfield found itself with greatly increased manufacturing facilities, refining facilities, which were built during the war in order to help satisfy the military's demand for gasoline and other products and——

Q. Do you know how those increased facilities came into being,—at whose request?

A. At the government's request.

Mr. Dixon: If the court please, I certainly object to that question as being wholly irrelevant and immaterial.

The Court: Overruled.

The Witness: At the end of the war Richfield found itself with greater refining capacity than it had a market for, because the government's large purchases of aviation gasoline and other products almost immediately stopped.

By Mr. Paradise:

Q. Do you know when they ceased? Did they cease as of a particular date?

A. Well, I remember that the government's orders and [fol. 2754] requirements for gasoline stopped within a matter of days following V-J-Day.

Q. That was in the fall of 1945?

A. Yes, sir.

Q. Have there been any other factors which have contributed to the increased needs for service station outlets?

A. Yes. Since the end of the war, why, Richfield has been the fortunate discoverer of new crude—new oil fields, and found itself with the necessity of finding a market for this oil.

Q. Has there been any change in the market demands for gasoline during the period that you have mentioned?

A. Due to the vast increase in population on the Pacific Coast, which is our marketing territory, there has been a very steady and substantial increase in the demand for various of the petroleum products since the end of the war.

[fol. 2755] Q. Would you be in a position to state the approximate percentage of increase?

A. Yes. As far as gasoline is concerned that can be very quickly and readily determined by a reference to the State gasoline tax reports which are available in all of the states in which we operate. And I recall that the increase in 1950 —this is the actual sales, now—the actual sales in 1950 were approximately 60 per cent in excess of what they were in 1941.

Mr. Dixon: May the record show a continuing objection, your Honor, to this line of questioning on the part of the Government?

The Court: All right.

By Mr. Paradise:

Q. What steps, if any, has Richfield taken to satisfy such increased need for service station outlets subsequent to the end of World War II?

A. It was readily apparent to our management that—

Q. Well, not what was apparent to the management, but what steps have been taken, Mr. King, just facts?

A. The necessary capital funds have been made available to the marketing department for the purchase of property and the erection of service stations to satisfy our requirements.

Q. Did you personally work on a budget that was designed to provide for the increase of service station facilities?

[fol. 2756] A. Yes, I did.

Mr. Paradise: I ask that there be marked for identification as the Defendant's exhibit next in order a group of photostatic pages, with a first page which is typewritten and entitled: "Marketing Department Proposed Capital Expenditures By Items."

The Clerk: Defendant's Exhibit P marked for identification.

(The document referred to was marked Defendant's Exhibit P for identification.)

By Mr. Paradise:

Q. Mr. King, I will ask you to examine Defendant's Exhibit P for identification and state whether that is the instrument to which you referred as a budget?

A. Yes, this is the copy of the capital budget as approved by our board of directors.

Q. Prior to your preparation of this budget, Mr. King—well, let me ask you this: At the time this was prepared were you then executive assistant to Mr. W. T. Dinkins who was then vice-president in charge of marketing?

A. I assisted him in the preparation of this budget in my capacity as manager of the southern division and also as his executive assistant.

Q. What instructions did he give to you in connection with the preparation of this budget?

A. My instructions were to determine where the company needed additional service station representation and in [fol. 2757] what numbers and in what locations, so as to enable us to adequately market the increased production of our refinery.

Q. In connection with those discussions or instructions did Mr. Dinkins instruct or inform you as to the need for the budget and for the expanded facilities?

A. Oh, that was discussed. That was naturally discussed many times in our meetings, because we all knew of our inventory situation and the increased manufacture.

Q. In summary, what were you informed in that respect?

A. Of the urgent necessity of acquiring and building, acquiring new properties and building new service stations so as to satisfy this increased production.

Q. When you speak of increased production are you referring to the increased capacity for gasoline at the refineries that you have referred to?

A. The increased refinery facilities that had been built up during the war.

Q. And are you referring also to the matter of the excess gasoline available as a result of the discontinuance of purchases by the Government?

A. By the Government. In other words, to take up the slack in that respect.

Q. Was this budget approved by the board of directors of the corporation, that is to say, Richfield Oil Corporation, Mr. King?

[fol. 2758] A. Yes, it was.

The Clerk: Defendant's Exhibit P-7 marked for identification.

(The document referred to was marked Defendant's Exhibit P-1 for identification.)

Mr. Paradise: The defendant asks that Exhibits P and P-1, being respectively the budget and the certified copy of

the resolution of the board of directors approving the budget, be admitted into evidence.

The Court: All right.

Mr. Dixon: The same objection.

The Clerk: These are admitted, your Honor?

The Court: Yes.

The Clerk: Exhibits P and P-1 in evidence.

(The documents referred to were marked Defendant's Exhibits P and P-1 and received in evidence.)

By Mr. Paradise:

Q. Mr. King, I show you Defendant's Exhibit M-4, which is table III attached to a stipulation between the Government and Richfield, and this exhibit is entitled: "Comparison of Number of Service Station Outlets." I call your attention particularly to page 5 and table I of that exhibit.

If the court would be interested in following this particular matter, I have an additional copy of this exhibit.

Mr. King, this table is entitled "All States" and am I [fol. 2759] correct in the statement that the four columns represent respectively the year, the number of L-O stations for those respective years, the number of dealer 3-C stations, the number of dealer stations, and the total number of stations for each such year?

A. That is correct for the years 1938 to 1950, inclusive.

Q. The dealer stations that are there referred to, is it also correct that that represents what we know as the so-called 337 stations?

A. That is correct.

Q. Pursuant to that budget that was prepared in 1946 and approved in 1946 were service station properties acquired?

A. Yes, we bought new properties for improvement.

Q. Would you state the nature of the properties which were acquired? Were they improved or unimproved sites?

A. The greatest number of them were unimproved sites. I would say 90 per cent of them were vacant properties, involved the purchase of vacant properties, and the balance would involve the purchase of existing service stations.

Q. On the vacant sites that were so acquired did Richfield construct service stations solely?

A. Richfield constructed the improvements at Richfield's expense.

[fol. 2760] Q. When was that expenditure made or the largest part of the expenditure that was approved by that budget?

A. The expenditures started in the latter part of 1946 or early 1947 and have continued to date.

Q. Has the budget appropriation been expended?

A. Not entirely so, no.

Q. Referring to the first column of that page 5 under the title "L-O Stations" will you state whether, notwithstanding the acquisition of service station properties as you have just explained, whether or not the number of Richfield's L-O stations has increased during this 10 to 12-year period.

A. This record discloses that we had fewer L-O service stations in 1950 than we did in 1941, in spite of the expenditure of a very substantial sum of money in this construction program that I have mentioned.

Q. How do you account for that fact, Mr. King?

A. There is a certain fatality in service station properties. We during that period of time lost a considerable number of L-O stations that were made obsolete by street and highway changes, or that had just outlived their economic usefulness. I mean by that, they were no longer profitable operations. And we lost additional stations where we could not renew the leases on them and where the properties were taken for some other use in development.

Q. Turning now to the use to which the L-O service [fol. 2761] stations have been put, in what manner does Richfield select and secure operators for these stations?

A. There are several methods that are used by our merchandising people. As a rule we have a waiting list of applicants for our L-O stations. At other times and in some areas, all depending upon conditions, we advertise for them. Our merchandisers seek for them among the helpers and assistants on service stations, trying to find individuals who are desirous of operating a station on their own.

Q. Do you know what percentage, if any, of Richfield's L-O operators have been independent dealers in their own

stations prior to becoming L-O operators in Richfield stations?

Mr. Dixon: I object to that question, your Honor, as immaterial.

The Court: Overruled.

The Witness: Will you repeat the question, please?

(Question read by the reporter.)

[fol. 2762] A. Well, it is difficult for me to recall, and that we have had few, if any, in answer to your question.

By Mr. Paradise:

Q. In what factors or qualities is Richfield interested in the selection of its operators for service stations?

A. We endeavor to be very careful in our selection of operators. We are looking for men of good character, of stability, because we are turning over a valuable property to them. We inquire into how long they have lived in the community, and their family, and past business connections, and experience. In other words, we try to select people of good character, who are stable, who will be a credit to Richfield in meeting the public.

Mr. Paradise: May I have Government's Exhibit 1-E again?

(The document was handed to counsel.)

By Mr. Paradise:

Q. Calling your attention again to Government's Exhibit 1-E, which is the same Form 542 of service station lease, I call your attention to the fact that this is the form which contains a provision for rentals, immediately following the 24-hour clause. I would like to have you explain, Mr. King, what is the policy in fixing and determining rentals payable to Richfield by Richfield L-O operators.

A. Our policy is to collect a rental of one cent per gallon [fol. 2763] on gasoline sold. There may be conditions or situations where the station may have an additional facility, such as a parking lot or repair building, or something of that sort, for which we will charge an additional rent commensurate with its value.

Q. Are those instances frequent or rare?

A. They are an exception to the rule.

Q. Forgive me for interrupting. Go ahead.

A. I should have added that our policy is to collect one cent per gallon. That is the maximum rental that we attempt to collect. We of course, have exceptions to that, where the rental charged the operator is proportionately less, and in some cases, in order to assist an operator establish a satisfactory gallonage in business, we have in many instances waived the rent, particularly if he is confronted with conditions beyond his control, such as the diversion of traffic due to street changes, or other factors. In fact, we have even reduced the rent that is required in any given case to a nominal sum of $1 a month.

Q. Prior to your appearance here today, we have had testimony of various rental reductions to $1 per month. Will you state whether or not that was the general practice, and, if so, what were the factors that caused it?

A. We would reduce the rent to that figure wherever our operator experienced any difficulty in developing a [fol. 2764] satisfactory volume of business, possibly in order to assist him in establishing a satisfactory volume at a new outlet or account, that had not been in operation before; in other words, whenever it was necessary to assist him in operating the station.

Q. We also have had testimony before you came on the stand today that in instances rentals were thereafter increased, that rentals which theretofore had been decreased to $1 per month were subsequently increased. If you know of instances of that kind, will you state what the reasons were for those increases?

A. We like to establish, or our rents are established on the basis of one cent per gallon, with a certain established minimum per month, such as one cent a gallon at the rate of $100, or $50. In other words, $50 and one cent per gallon would mean the station was producing, say, 5,000 gallons. We may raise that minimum to approach the actual gallonage that the station is pumping, but not so as to increase the rate paid per gallon of one cent.

Q. Now, perhaps I have misunderstood you. Is there any overlapping or duplication? Is the $50 in addition to the one cent a gallon?

A. No, absolutely not. In other words, our maximum rate per gallon is one cent, so that any increases that we make in the flat amounts would not increase that rate per [fol. 2765] gallon.

Q. You have had instances——

The Court: That one cent a gallon is not the margin of profit. It is merely the manner of computing the rent?

The Witness: That is, your Honor, that is only the rent that we get for the use of the premises.

The Court: That is right.

By Mr. Paradise:

Q. We have also had testimony, Mr. King, of instances where the operator was paying, for example, $50 a month with one cent per gallon over 5,000 gallons, and then the rent would have been increased to, for example, $70 and one cent per gallon over 7,000 gallons. What was the reason for requiring a rental change of that sort?

A. Only to facilitate the collection of the rental. In other words, the dealer would pay that amount in advance during the month, or at the first of the month, between the first and the tenth, and it reduced the amount of overage of rent that might have to be collected the following month.

Q. Is the gallonage rental collected at a different time than the flat rental?

A. Yes. The gallonage rental is collected before the 15th or 20th of the following month.

Q. And the flat rental collected when?

A. The minimum rental is due by the 10th of the preceding month, or, I should say, by the 10th of the month. [fol. 2766] Q. Did you feel that collecting a flat rental in advance was of any assistance to the dealer, as well as an assistance to Richfield?

A. Yes, it simplified our collection expense. At the same time it helped the dealer stabilize his own operation, because sometimes operators have to be trained in good bookkeeping and business methods, and if they pay their rent in advance, why, we have found it has helped him in the operation of his station.

Q. Now, has Richfield given these L-O operators at its L-O stations any financial assistance of any sort?

A. Well, I believe we have touched upon our policy to reduce or entirely eliminate the operator's rent, wherever conditions warrant and justify that.

Q. You are speaking now of the rental reductions?

A. The rental reductions.

Q. Are there any other such practices?

A. Yes. We assist—we loan money to our operators, where they do not have sufficient capital to operate the station, and where they are people of good character. We will loan them substantial sums, I know up as high as 2,000 or 2,500 dollars, so that they can carry an adequate inventory and be in a position to do business.

Q. It is correct, is it not, that a service charge is charged by Richfield's credit and accounting department in con- [fol. 2767] nection with those loans?

A. A nominal charge, a flat charge. I believe it is $25.

Q. Do you consider of financial assistance the matter of the facilities furnished by Richfield to the operator?

A. Well, I certainly think you would consider that as a financial assistance in this manner, that many of our stations represent—well, I would say they represent an average investment of probably 25,000 to 35,000 dollars, so that we are turning over a pretty valuable piece of property to this operator, a property that would be far beyond the average individual's ability to acquire otherwise.

Q. Do you have any knowledge of whether or not the maximum one cent per gallon rent that you charge is equivalent to more or less than the fair rental value of that service station?

A. Well, in the great majority of instances the rent that we collect on our leased out service stations does not represent what would be called a fair return on that investment,——

Q. I am not talking about that.

A. —or an adequate rental. As an illustration, I know of properties where they may represent an investment of, say, $35,000 or $40,000, and the rent received might not [fol. 2768] exceed $100 a month.

Q. I wasn't thinking of it so much in the sense of a return on the investment to a person owning capital and expecting a return. I was speaking in the sense of a fair market value from a rental standpoint, as a fully equipped service station.

A. I think that can be simply answered this way, that most of these stations, if we were to put them on the market and lease them, put them out to the highest bidder, we would collect a rental far in excess of what we collect from the average operator.

The Court: Yes, but you couldn't get anybody who would take on an onerous contract like that, which is terminable at will on 24 hour's notice.

The Witness: Possibly you misunderstood me, your Honor. What I mean was this, in trying to answer Mr. Paradise's question as to whether or not the rent we collect is commensurate with the value of the investment. I tried to answer it by saying that if we were to take a certain number of our units, where, for instance, we had no need for them in a certain area, or we desired to liquidate them, we will say, or devote them to other purposes, if we put them on the market to the highest bidder to lease under a long term arrangement, they would bring us a rent far in excess of what we get from that operator.

[fol. 2769] The Court: That is right, but you would lose all the advantages of your control, which you exercise over them, which is almost limitless. You would have to have a contract that would give a fixed term, and you would have to give the man reasonable notice, and if you did not allow him to sublet, you would have to allow him to sell his stock, and you wouldn't be able to come there in the night and tell him to get out at 8:00 o'clock in the morning and say, "We will take only this stock, and take the rest and chuck it into the ocean," which the testimony is you have done in many instances. So it is speculative.

The Witness: Yes.

The Court: I agree with you that if you put it on the market, after you have established a trade, it would have a greater economic value so far as money is concerned, but you wouldn't have the control which you exercise now.

The Witness: That assumes, of course, we wouldn't have the station. I was simply trying to illustrate they would have a greater market value.

The Court: Oh, yes.

The Witness: Or that the rental that we would collect would be far greater than we would have normally received.

The Court: I think this is a good place to stop for a few minutes.

(A short recess was taken.)

By Mr. Paradise:

[fol. 2770] Q. Mr. King, just before the recess I think you had given three instances of assistance given L-O operators, consisting of furnishing the place of doing business, the facilities, the rental reductions and the loaning plan. In connection with those facilities can you tell me is there any instance in which any L-O operator owns either the service station building or the tanks or the pumps or the fixed items of equipment on a Richfield L-O station?

A. There is no instance to my knowledge where an operator has any investment in the fixed assets. His investment is confined entirely to inventory and what we would call small tools.

Q. Do you specify the nature of those tools before he is permitted to take over the station?

A. Yes. We direct the type of equipment. I am speaking of lubrication equipment, tire equipment, etc., that he is to purchase.

Q. Are you familiar with what has been referred to at times in this case as "the subsidy letter"?

A. Yes.

Q. Would you state whether or not that is another type of financial assistance that extended to L-O operators by Richfield?

Mr. Dixon: If the court please, I object to the classification used by counsel as "financial assistance."

[fol. 2771] Mr. Paradise: I will withdraw any classification, then.

Q. Mr. King, I show you Government's Exhibit F, which consists of a series of four mimeographed letters. These particular letters are addressed to Mr. George Bauer who was an L-O operator and who has testified in this case, and ask you if you will state whether those are Richfield forms?

A. These are forms Richfield uses.

Q. Well, those are Richfield forms that Richfield uses, is that correct?

A. Yes, sir.

Q. Now, will you state the purpose to which those forms are used?

Mr. Dixon: Which forms, counsel?

Mr. Paradise: The purpose for which the forms are used.

Mr. Dixon: What exhibits are those, counsel?

Mr. Paradise: That is Exhibit F.

A. Whenever there is a gasoline price war the dealer is confronted with lower prices and in order to assist him to retain his business in the face of lower prices, we will permit the dealer, if he so wishes, to sell at less than our authorized or direct retail price, and if he chooses, we will agree to reimburse him for the amount that he has lowered his price.

Q. Now, Mr. King, you mentioned "dealer". Are you [fol. 2772] referring to the L-O operators or to someone else?

A. I am sorry. I am referring strictly to L-O operators.

The Court: To L-O operators?

The Witness: To L-O operators.

The Court: We have used the word "dealer" but designate the stations other than "L-O operators."

The Witness: Thank you. I understand. It is my mistake. I am referring to L-O operators.

The Court: L-O operators.

By Mr. Paradise:

Q. Prior to the use of a letter of this sort and the issuance of it to a particular L-O operator, can you state what is the normal margin allowed to an L-O operator on gasoline?

A. The normal margin or markup from the wholesale or the tank wagon price is four and four and one-half cents on the two grades of gasoline, that is, the second and the first structure gasoline.

Q. Is it a correct statement that a dealer is permitted to buy our house brand gasoline at four cents under your directed retail price?

A. Yes.

Q. And is it four and one-half cents on ethyl gasoline?

A. Yes.

Q. What is the effect of this letter? During the time [fol. 2773] that this letter is in effect is the dealer's margin guaranteed to him at those same figures that you have just mentioned?

A. The effect of that letter is this: That if it was necessary for him to reduce his price two cents per gallon in order to meet competition, and we authorize him to reduce his price by that amount, that we would then by virtue of that letter subsidize him to the extent of two cents so as to maintain during that period his margin at four and four and one-half cents.

[fol. 2774] Q. Now, Mr. King, turning to a different subject matter, and that is the matter of the termination of L-O operators from their stations.

May I withdraw that, and before I leave those other subject-matters ask you: Will you state whether those matters that you have testified to concerning rental reductions and lending plans and subsidy letters and furnishing of facilities are matters of isolated instances or of general company practices and policies?

A. Those are all general company practices, and have been for a number of years, and are today.

Q. Now, turning to the matter of the termination of L-O operators, will you state under what circumstances and for what reasons L-O operators have been terminated from their tenure in Richfield's L-O stations?

A. As I have previously testified, the operator is instructed by Richfield as to how he shall operate the station. That includes a number of things, such as his maintenance of the property, its cleanliness, his appearance, the products which he will handle and so on, and the manner in which he shall generally operate the station.

Whenever the operator violates any of those instructions, they are called to his attention, not once, but several times in an effort to have him conform to our instructions. When we find an operator who is unwilling to, should I say, [fol. 2775] to co-operate with or to follow our instructions,

after repeated warnings, why, we would consider that ample grounds for the cancellation of his 542.

Q. Do you know of any circumstances when an operator has been terminated for the first infraction of any of those instructions?

A. No, I do not.

I think our practice has been to do everything possible to encourage the operator to follow our procedures, so as to make a more successful operator out of the individual.

Q. Have instructions to that effect been given to the divisions?

A. Generally, yes. However, it is within the discretion of the operating people in the divisions as to when they should exercise their authority to cancel an operator's lease.

Q. At the time of termination of an operator's Form 542 sublease, does Richfield, as a matter of practice and policy, take any action in connection with the distribution of the operator's inventory of petroleum products, or his inventory of tires, batteries, and accessories or his equipment, his movable tools and equipment, that you referred to?

A. It is Richfield's practice and policy to see to it that the outgoing operator sells his inventory, provided it consists of Richfield products and the approved TBA items, [fol. 2776] as well as our approved list of service station equipment, hand tools, and what-have-you, the products and the TBA at the prevailing, current prevailing market price. Now, the equipment at a state rate of amortization or depreciation, which, I believe, is 20 per cent per annum.

Q. Is it correct that that matter pertaining to equipment applies only to equipment that Richfield has approved for use at the station by that operator?

A. Yes. We have approved certain makes and types of lubrication equipment, tire equipment, and so forth, and provided the operator has purchased that equipment, we will see to it that he receives the depreciated value of that equipment, if and when his lease is canceled.

Q. You say that he will receive it. I asked you from whom he will receive it.

A. The general rule—generally, the incoming operator

takes over the inventory and this equipment at the values that I have previously mentioned. If for any reason the station is not maintained in operation, in other words, if an operator is not being immediately checked into the station, then in that case Richfield would credit his account or take the merchandise back.

Q. Is the prospective operator of one of Richfield's L-O stations informed of this practice at or before the time he is permitted to occupy the station?

[fol. 2777] A. Yes.

Mr. Dixon: I object to that, as to the form. He is asking this witness obviously a question which he cannot answer unless he was present at the time every one of the L-O operators was canceled.

The Court: Let's read the question. I think it is——

Mr. Paradise: I can save trouble, your Honor. I will withdraw the question.

The Court: All right.

By Mr. Paradise:

Q. Have you issued instructions, Mr. King, to your subordinates in the marketing division as to whether or not prospective operators be informed of that practice at the time they are installed?

Mr. Dixon: What practice, please?

The Court: Pardon?

Mr. Dixon: What practice, please?

The Court: He is talking about what they have to purchase. Isn't that it? Isn't that what you are talking about?

Mr. Dixon: No, I was talking about the fact that provision will be made to take these things off their hands at the time of their termination, when they move out.

The Court: Provided it is on the approved list.

Mr. Paradise: Yes provided they are approved.

By Mr. Paradise:

Q. In order to straighten it out, what instructions are [fol. 2778] given or have been given to your subordinates in the marketing department concerning statements to be

made to prospective operators concerning the taking over of petroleum products, accessories, and approved equipment?

A. Instructions have been issued to the organization handling our leased out stations to fully explain to prospective operators the basis upon which they purchase the inventory when they go into the station, and the basis upon which they sell that inventory when they leave the station.

Q. Does Richfield have what is known as a training plan or program?

A. With respect to what?

Q. With respect to either merchandisers or L-O operators.

A. Yes, we have.

Q. Will you state when it started, and what it consisted of?

A. We have had training programs in effect since before the war, and with the end of the war, these programs were greatly enhanced and accelerated, and include training schools lasting for some two to four weeks for our merchandisers, all of our merchandising people, together with refresher courses, so that they, in turn, can conduct schools, training schools, for our operators, so as to teach them in our system of service station operation.

[fol. 2779] Q. Were training schools conducted during the war?

A. No. They had to be abandoned during the war because of lack of man-power and other difficulties.

Q. Mr. King, I would like to ask you concerning the tenure in terms of duration in time of these L-O operators. Do you know how many or what percentage of L-O operators—put it this way: How many L-O operators in comparison with the total number of L-O operators have worked in that capacity for a period of, say, in excess of ten years?

A. Some years ago we established the practice of awarding operators a badge or an award for five, ten, fifteen and twenty years of service, so I can pretty well answer your question.

[fol. 2780] Q. Well, Mr. King, let me call your attention to the fact that this case only concerns practices of this corporation, which went into business in March 12th of 1937. Let me reframe the question. How many L-O

operators are there who have been such for a period of five years, do you know?

A. Yes, I do.

Q. How many?

A. Approximately?

Q. Yes.

A. I would say in excess of 20 per cent of our operators have had stations or leased stations from Richfield in excess of five years.

Mr. Dixon: May I interrupt to ask counsel at this time to inquire on voir dire as to the basis of that opinion? Or, if the court please, would you rather have it done on cross examination?

The Court: I do not think it is material. If it is material at all, I do not think it is of any great importance because it is conceded that so long as they obey orders they can stay as long as they want to. If they do not, out they go, and that is all there is to it. That is the pattern and I do not think it is contradicted. I do not think Mr. King would contradict it.

So it does not make any difference how many actually remain. It is just like people who are married, you know. [fol. 2781] Some stay married 30 or 35 years, like myself. Others kick over the traces, you know, in a few years. It just depends how long you want to stay in harness one way or the other. I don't think it means anything.

As I say, I am not trying here the business practices of Richfield Oil Corporation, whether they are good landlords or bad landlords.

I will admit, if you toe to the straight line, why, you can stay there for the rest of your life, and you have evidence of people who have stayed there for years and then violated certain things, and because they would not give in, out they went in 24 hours time. That is the pattern and I do not think it is of very much importance whether a percentage remained with them. We are not interested in that here. They probably could produce their 30 years employees if they tried to, if they went back to their predecessor. I am not interested in that.

Mr. Paradise: On your Honor's statement, I am agreed it is not too material.

The Court: No. Let us confine ourselves.

Mr. Paradise: The only reason of introducing it was on the plaintiff's case there was evidence of a lot of so-called hardship cases, and it appears that those are just isolated instances.

The Court: Well, I call them such merely to indicate [fol. 2782] that in the particular instance the termination was so abrupt, the man was given so little chance to even deal, and men were rejected who had been just as satisfactory to Richfield financially, and financial arrangements were repudiated because they insisted there had been a breach of the conditions. So that is why I talked about hardship cases.

But ultimately it does not make a bit of difference. Perhaps the very hardship of the case lends support to your argument that, after all, you were just as though you owned the station, except you do not assume responsibility for the acts of the operator and he is your employee. You do not pay social security. If somebody is hurt, he is responsible, and a lot of other things that go into different kinds of relationship do not apply.

You call it a "Leasehold which is terminable." It is not a license, it is a leasehold terminable on 24 hours, which is a leasehold. It is not a license.

So, whatever category it is, we will determine later on regardless of common law categories, to see if it is a relationship that makes the imposition of the conditions that you do proper or improper.

Well, at any rate I will allow the statement to remain, but I am merely making the statement to show that it is not of very great importance or to warrant the breaking the cross examination or seeking any great detail. I am not [fol. 2783] interested in any more particular details than that.

As I say, the personalities of the parties are not involved here at all, whether it is Mr. Jones or any of the others. Off the record:

(Short discussion off the record.)

The Court: Let us get back to the record.

Mr. Paradise: Thank you, your Honor.

The Court: All right.

By Mr. Paradise:

Q. Mr. King, referring now to the volume of gasoline, the gallonage sold in L-O stations, do you know whether the average gallonage per L-O station has increased or decreased since the end of the war, and I am speaking of World War II?

A. Yes. Our records will show that the average gallonage of our L-O service stations has increased very substantially since the end of the last war.

Q. Do you know the approximate percentage of increase?

A. Slightly in excess of 50 per cent.

Q. That is all L-O units of Richfield?

A. That is of all L-O stations.

Q. To what do you attribute that increase, what factors?

Mr. Dixon: If the court please, I think that clearly calls for a conclusion of the witness. It is obvious that they have sold, from his statement, apparently twice as much gasoline to the L-O outlets as they did before the war. But [fol. 2784] I think beyond that his explanation for that is of little consequence.

Mr. Paradise: I admit it calls for his conclusion. This man is an expert.

The Court: I beg pardon?

Mr. Paradise: I say, I admit it calls for his conclusion. This man is an expert.

Mr. Dixon: If the court is interested, I will withdraw my objection, but I think it clearly calls for conclusions.

The Court: Oh, in a general way. Gentlemen, I want to make this observation. There is one thing about which I make the observation. As the law of the United States stands at the present time the question of monopoly is determined by whether it exists or does not exist. Whether it is good or bad for the industry, whether it is motivated by good motives on the part of the operator is absolutely immaterial, gentlemen. Those considerations have been excluded from consideration for the last 20 years. And I said so in the Standard Oil case and it is the law everywhere.

We are not interested in the goodness or badness of the monopoly. Judge Hand in the Fashion case is the only

case—I did not know it until somebody made a speech about it—asserted that principle and I reasserted it after 28 years, in the Standard case. In fact these cases used to be tried and the case went up on the record as to whether [fol. 2785] it was good or bad. And then some of us began reading the law and the law is not concerned with whether it is good or bad. That is a question to be directed to the legislature.

For that matter, the Supreme Court has said repeatedly it does not make any difference whether it is advantageous or not. So that all these arguments about the economic impossibility of doing business except on those terms, to which days are being devoted in other cases, I will not allow to be gone into at all because they are no concern of mine. The law is there. I did not pass it. The Republican Congress passed it and the interpretation has been laid down by the courts for 50 years. So I am not concerned with the ethics of monopoly. I am concerned only with the existence of monopoly. So if a practice is there, it is condemned, and the Supreme Court has made an effort not only recently but for 20 years and has so decided.

In the Socony-Vacuum case they said it did not make any difference whether the fixing of prices were at a high or low level or at a minimum, is good or bad for the industry. What they are concerned with is, is it there. And if it is there, it is invalid per se.

Other practices they have said are bad if they result in a restraint of any interstate commerce, and when they mean restraint, it does have that result. Whether it is good for the country or bad for the country is no concern of [fol. 2786] ours.

That has made a lot of this agitation that is going on, and I regret it. Recently—and fortunately the other case is not before me—the Standard Oil Company during the pendency of that case did not write the kind of advertising which is appearing every day in California, talking and referring to this case and saying this is the type of a man the antitrust wants to put out of business. I commend you gentlemen for not publishing that kind of advertising while this case was pending because, if you had, you would have heard from me.

But the entire thing, in the first place, is very improper for a large corporation or anyone to do that kind of agitation through the newspapers.

Even while I was in Seattle—it is a good thing I did not go—I was invited to attend a luncheon, and, if it was not some big officer of the Standard Oil Company was giving that lecture about the antitrust. It would have turned my face red if I had been there. I would have gotten up and walked out or something would have happened, because that case might land in my court too, just as this case landed after two or three years.

So a lot of argument that is going on at the present time is absolutely beside the point. It certainly has no place in this court. I am not interested in the goodness or badness [fol. 2787] of these practices. The only reason why those facts were gone into and the only reason why we call them hardship cases is to point out the kind of control that exists, to show where it begins and where it ends. All we are interested in is to determine whether in view of the type of relationship that exists in these three types of stations the restrictive practices are a burden on interstate commerce or have a tendency to burden interstate commerce. If they are, it does not make any difference that any other practice would land the Richfield Oil Corporation in bankruptcy. It is no concern of mine.

Mr. Paradise: I appreciate your Honor's statement, because I think it gives a chance to orient the materiality of the evidence.

The Court: You know I have said very little up to the present time. The Government's case is in and I can say much more, and we ought to have an understanding and I want to make it absolutely plain, because I have had even economists. They have offered to bring in economists. What do I care for economists? I am just as good an economist as they are. I know what to read and how to read the material that they read.

I am not interested in the economics of monopoly. I am interested in monopoly. Does it exist? Does it not exist? Whether it is good or bad is no concern of mine.

[fol. 2788] Congressman Sherman, when he enacted the law, was concerned with monopoly. The Supreme Court

has interpreted it, the Clayton Act followed it. Then you have the Robinson-Patman Act.

You see, I am living with monopoly and living antitrust, because when I am not on the bench I am writing an opinion on the Robinson-Patman Act. So if there is a case dealing with the subject matter or a law review article I have not read, why, call it to my attention.

So I am living with this thing, and the more I live with it the more am I satisfied that the Congress in the exercise of its plenary power to control commerce may declare what should go into commerce, and having power to declare what should go into commerce, they may prohibit altogether. Whoever can prohibit altogether can regulate almost limitlessly. And therefore because the control of commerce interstate is exclusively within the province of the Congress, anything they consider a burden upon that Congress, such as monopoly, they could regulate. They could even abolish, and the Fifth Amendment does not apply to that.

The Supreme Court has said that even the "due process clause," away back in the Addison case—they said that even the due process clause does not apply to the regulation of interstate commerce, not to the extent that you can just flout it, but that the due process clause in the Fifth [fol. 2789] Amendment which would invalidate interference with contracts has little significance when it comes to commerce, because there you have a plenary power. Under your plenary power, if you interfere with contracts or even abolish them, it is just too bad because the plenary power overrides the right of contract. The Supreme Court started to say that in the Addison Steel case and it has been saying it ever since.

So we have got a piece of legislation that was passed under the broadest power Congress possesses, in a law that has been before the courts for 50 years, when that court has had full opportunity to interpret it. They have laid down the rules. And one of the fundamental rules they have laid down for us is this: That monopoly or monopolistic practices which the Government establishes are forbidden regardless of whether they are good or bad, and it is no excuse, no defense to an action of this character that the practice was beneficial to the public or that the company was compelled to adopt it by economic compulsion.

That is why I was so surprised when I was in New York when I heard that Judge Medina was actually listening to an opening statement in which counsel were showing him that the investment banker, by necessity, is monopolistic, therefore, he ought to take that into consideration. Without any criticism of Judge Medina, because he is a very brilliant judge and will probably be on the Court of Appeals [fol. 2790] in view of Judge Learned Hand's retirement. But, as I view the thing, the inquiry is absolutely unlimited in any case. It may well be that the pleadings in that case are such that the Government opened itself up to that type of inquiry and I did not hear anybody objecting to it, but it came to me as a surprise.

[fol. 2791] So let us have this understanding. You don't have to defend it. It is very well to indicate it, if you desire, for the benefit of the record, so that it would not be a one-sided record, that those practices are hardship cases, in fact, and that as a matter of fact, in the majority of cases the men stay, because they conform. But if, as a matter of fact, the record showed that you had a turnover, a terrific turnover, it would not affect my judgment one way or the other as to what the particular practice is. All I am interested in is to find out whether or not the particular control you exercised is forbidden by the law.

Mr. Paradise: Yes, sir.

The Court: All right.

Mr. Paradise: In order to clarify the type of proof that is coming in, may I make a statement concerning the relevance at this time? Would that be satisfactory?

The Court: You may do that. Remember, I am making this statement merely to give Mr. Dixon warning that by allowing you to go on, I do not intend to open up the record for discussion or argument, and I am not going to allow any persons to go on the stand and show me financial statements showing they were losing money, and were doing this for that reason. I am not interested in that at all.

You see, the business interests of the United States, if they are particularly hurt by a type of litigation, have one [fol. 2792] recourse, to go to the Congress, the way a lot of companies have gone. The Wolverton bill was passed and I think it was vetoed.

Mr. Dixon: It was, but it was passed over the veto.

The Court: There is even a bill up now to exempt baseball from antitrust laws, and insurance companies also. But that is the American way, to go before the Congress and change it, and if that is the case the discussions as to it have no place in this litigation.

Mr. Paradise: Yes.

The Court: As a matter of fact, I have in front of me a series of law suits involving the motion picture industry, and that just shows you that if the government does not do it, someone else does it. The government has left the motion picture industry alone since they got the Paramount decision, but every large theatre in the larger cities is suing for hundreds of thousands of dollars, the companies whom the government has left alone. So I have three of these cases pending now, and other judges have them pending, so at the time the case came up to be set for trial, I said, "Listen, gentlemen, you who operate motion pictures are going to kill the goose that laid the golden egg, because if you make it impossible for these people to produce pictures, you are through. You can't just go out and it isn't like publishing a book, where you can get yourself another [fol. 2793] author he will give you a book. They cannot produce these motion pictures, you are going to be out."

And I said, "If I should declare a free trade in pictures, you are going to lose out, because if I declare a free trade, then anybody can get a picture, regardless, by bidding the money for it." So I suggested that they ought to get together, and that I would act as arbitrator, to see if I could not find some means of establishing a practice that would conform to the law, and at the same time take into consideration the needs of the business.

Now, that is what a judge can do in a case of civil litigation, but in a case of this character, I can do nothing. I can do nothing. I have no power to use my good offices to adjust the matter, and as to the policy of the law, that is no concern of mine and so I have always insisted upon the limitations of our law.

In fact, I gave a lecture at Berkeley in the law school there a year or so ago, which was published in the Pennsylvania Law Review of November of last year entitled, "Limitations of Law and Judicature" and the entire object of that lecture

was to point out how limited we are in our scope, because we live in a country under a government of law, and not a government of men.

Now, if I permit considerations to go into the case which are legislative in character, and have nothing to do with [fol. 2794] the case itself, or considerations of policy, why, I am substituting my judgment for the judgment of the legislative body which enacted the law. That is why we are taught to have nothing to do with the policy of the law. The policy of the law is only material to us when we come to interpret it, in order to see the legislative intent, where we are in doubt as to what the legislative intent was.

In the research I am doing for this other opinion, I ran across a very interesting situation, that some of the things that the courts of the United States have considered a violation of the statute, the English courts have permitted, and the Court of the King's Bench way back in 1910, for instance, held what you call cutthroat competition, undermining the other man's price structure, valid, and which is now forbidden by the Robinson-Patman Act. The English Courts, the way they have interpreted their statutes, have permitted it, and I say that a lot of these questions are a question of policy with which we are not concerned in this case.

With that statement, you may step down now, and I will allow Mr. Paradise to make as elaborate a statement as he wants to, and probably we will clarify our thoughts, and it may be a guide as to the limitations of the testimony that you may desire to offer.

Mr. Paradise: Thank you, your Honor, because I think [fol. 2795] I would like to state first the things that are not involved in this case.

There is not involved in this case any attack on the policy of the law. As your Honor has mentioned, that is not involved. Nor is there involved in this case any question or issue of monopoly.

We are involved with a charge of a restraint of trade under the Sherman Act, and a violation of Section 3 of the Clayton Act.

Your Honor has just mentioned something as to whether or not this is a monopoly.

The Court: Well, I am using the word "monopoly" in the general sense, that the object of the statute, the main purpose of the statute, is to prevent monopolies, by controlling certain practices in restraint of trade.

The Supreme Court has said in one case, and I forget which one it was, I think the insurance case, that the object of the statute is to maintain our economy as a competitive economy. I think it was in the insurance case they made that observation. So when I talk about "monopoly" I merely use that one word to express the scope of the statute.

Mr. Paradise: The underlying purpose of the antitrust laws, we realize, was the protection of the freedom of competition. Section 1 covers restraint, and Section 2 monopoly, and just so we understand each other, I will say there [fol. 2796] is no charge of a violation of Section 2 of the Sherman Act.

The Court: I understand.

Mr. Paradise: And I think that is what Mr. Justice Frankfurter had in mind in the Standard case, when he commented that these were independent businessmen, because they had certain exclusive dealing contracts at independent service stations between Standard in that case and the independent dealers at the Chevron stations. He said if, on the other hand, these were not independent service station dealers, and these stations were acquired by Standard either by purchase, or ownership, or he mentioned agency or employment, he said we might have a problem of monopoly under Section 2 of the Sherman Act, but that is not involved here. And I must point out that is not involved in this case either.

We are not by this testimony asserting any matters relevant to benefit to the public. We fully recognize that the law is established that that is no defense either to a charge of monopoly, nor is it relevant to a charge of restraint of trade.

However, the matter of a defendant's intentions is relevant, both in a monopoly case, as well as in a restraint of trade case, and I think that is made abundantly clear, at least as recently as the Columbia Steel case, which is

[fol. 2797] the latest pronouncement on the Sherman Act, of which I am aware.

It seems to me that is most appropriate to the subject-matter that Mr. King has just been testifying to. The question arose there whether it was a violation of Section 1, and I believe also of Section 2 of the Sherman Act, both the question of restraint, as well as the question of monopoly, by the acquisition by United States Steel of the Consolidated Steel out here, and there was that problem of vertical integration, which your Honor mentioned earlier.

One of the chief problems involved in that case, and considered by the Supreme Court was the question of the intention of the acquisition. It was pointed out that Columbia Steel Company had acquired the Geneva Steel plant with at least the approval of the United States government. I believe the testimony in that case was that the United States Steel Company had been invited to bid on the plant by the Defense Supplies Corporation. Here we have enlarged our refining capacity very much during the war at the request of the government.

The Court: I will say this: That, as a matter of fact, I think in the Columbia Steel case the very fact that a law had to be passed as a result of it shows it was not a popular decision. It certainly has been subject to very much criticism on the part of law writers, and everybody else. The strength of the case and the problem of chief consideration was this, that there was an invitation to bid, and they [fol. 2798] thought because you invited a person to bid on a plant, and you had practically the tacit approval of the Department, that the bid would be all right, only to find afterwards that somebody was prodding that they go on. That is why the Attorney General was in such a bad position, because the same Attorney General who sought to defend the Act was the Attorney General that was consulted in advance about the bidding. So I think the Columbia Steel decision is a decision of very small scope, and that argument certainly cannot be applied. I said so in the supplement I wrote to my opinion, that the argument cannot be applied. Being invited to bid to acquire property that was for sale in the open market, being invited by the government, and then being sued by the government is an entirely different proposition than merely creating, or, rather, en-

couraging enlarged facilities on the part of private industry, without government capital, as they did as to others. It is not like the aviation industry, where the government put up the capital and bought the buildings, and then attempted to lease them, and then even underwrote 80 per cent of the contracts at the bank. I used to say in some of these cases during the war that Mr. Douglas probably didn't own the desk at which he was sitting, because if he looked at it he would find a stamp "United States Army" or "United States Navy" on it.

We are not dealing with that kind of a proposition. We [fol. 2799] are dealing with a situation where I have allowed you to show it, and where you merely show that you had to expand, or that you had to find outlets because you had enlarged your facilities, and you wanted a market. That is an entirely different proposition than the proposition in the Columbia Steel case.

Mr. Paradise: Yes, but the purpose of the testimony, however, your Honor, was that it was not a monopolistic enlargement, but it was a defensive measure. It was a device to continue to wage competition.

That was the reason for the creation of the L-O unit. Now, as to the particular type of testimony——

The Court: There is no objection to that testimony being in there. I want to give you this: I am not going to let Mr. Justice Frankfurter tie me to a label to satisfy some of those who have talked about the tyranny of labels. So I am not going to take that negative phrase that he put in, if they were independent businessmen, and others were to put an absolutistic designation of special character, so that if you have a relationship that is akin to it, but cannot be called independent businessmen, that the practices may not be in restraint of trade as to those. He was talking about the peculiar, particular things. Furthermore, he was not talking about the Sherman Act, because he never got that far, so that his use of that phrase is merely descriptive. [fol. 2800] It does not say that he has to be what I would call an independent businessman.

In other words, I don't want to have the words, or I do not feel bound by that designation any more than you say you do not want to be bound by the designation of "inde-

pendent contractor" as that term is used in the law on contracts.

In other words, we are realists, both of us, and we have to determine what relationship exists, remembering, however, that in talking law and questioning relationships, we have in mind certain categories which are established in the particular law. Maybe I have got into another twilight zone. Maybe you have created a twilight zone. Maybe you have created a relationship which is not employer and employee, or lessor and lessee, or independent contractor, and yet is nameless, as I started to say.

Then I would have to determine, as we do in applying the rent control law, the theory of the dominant characteristics, and whether you determine a thing is an apartment house or not, or a hotel or not, whether the characteristics of one relationship with the other are more dominant than the other; it may well be before we get through we will have that kind of a problem. So, you see, if viewed under the "tyranny of labels", I don't want to let that lie. That sounds more like Pound, or maybe Llewellyn, some one of the new men, "the tyranny of labels."

[fol. 2801] Mr. Paradise: I agree with your Honor's last statement. But your Honor realizes we have a very different issue and a very different problem involved here than involved in the Standard Oil Company case. In the Standard Oil Company case, as I mentioned at the outset, there was an acknowledgment of independent businessmen, and at the conclusion of this case I would like the privilege of pointing to all the admissions of the Standard Oil Company, to show that that was a fact.

Here we have a question of, as your Honor has pointed out, what is your relationship? Now, I don't think we have to name it, and the reason I don't think we have to name it is that it isn't important what label you give to it. What is important is the framework in which we consider this problem.

The problem, considered from the standpoint of the antitrust laws, must be considered from the standpoint of whether or not it is a subject-matter of competition. The government knows that that is an essential factor, because they have said that this is a market which, they said, we

foreclosed, that is, Richfield has foreclosed this market from its competitors.

The Court: That is right.

Mr. Paradise: Our proof will show that is not a market and it never was a market, and the reason for it is, and I [fol. 2802] want your Honor to appreciate it, the reason is not only because we own the stations. The ownership is one of the factors, but I think there is a bundle of factors that enters into the reason why this is not a market, and therefore, is beyond the scope of the antitrust laws, and this fact is included in our purpose in acquiring the outlet.

Our ownership, we admit, is one of the factors, but not the sole one. The fact that when he goes in he knows he is in there for the purpose of handling these products, and he knows we have a short term cancellation for the purpose of implementing and enforcing the principles, as it is expressed; the fact that we give certain benefits to the man in the nature of this rental reduction, and the subsidy letter, where we guarantee him a margin; and the fact that we do not permit him to display his merchandise in a way we don't like, and various other aspects, in the presence of which there cannot be any such relation as independent businessman.

Now, I hope I am not taking the court's time too long, but I would like to add a few more thoughts.

The Court: We will adjourn as soon as you finish, but I will let you make your full statement, because I made a full statement, and I understand your position.

Mr. Paradise: I think the government is fully aware of the fact that a necessary corollary of its proof requires a [fol. 2803] showing of a market, and unless there is a market, it cannot be foreclosed. In other words, those are parts of the same equation, unless there is a market there is no violation of either the Sherman or the Clayton Act, and a necessary factor in the problem is whether or not this man is an independent businessman.

Now, it has been well stated that these are the factors, and I will cite this to your Honor at the conclusion of the trial, that these are the factors in determining whether a man is an independent businessman:

That he has a right to buy in a competitive market and

deal with several companies, as he so desires. We submit that is not done.

That he has a right to select his own products and equipment. That is not done.

That he has the right to determine his own sales policy.

That he has a right to determine his own need of advertising.

That he has the right to determine the manner of the display of his products.

That the good will of his business is transferable at his pleasure and at a consideration satisfactory to him, and that the continuation of his business is not dependent on the will of another.

We say that those factors are cumulative, and that these [fol. 2804] men have none of these attributes.

Therefore, I say it is unimportant whether you call this man an agent, an employee, or what you would call him. We are considering whether this is a market and whether he is an independent businessman, and we say this is not a market, and if it is not a market, it cannot affect competition.

Now, the precise question to which Mr. Dixon's last objection was raised didn't relate to this overall problem.

The Court: No, but it has given us a good chance to discuss it.

Mr. Paradise: And now we are getting back to a specific thing.

The Court: As I said, I didn't sustain the objection, and I told him why, and it merely has enabled us to discuss this matter.

I think I understand your position very clearly, but I wanted to get back at this point that ultimately we come back to the language which you quoted right in your opening statement from Mr. Justice Douglas, that ultimately the question cannot be decided by technical designations which lawyers have adopted, and that applies to any kind of relationship, whether you call it employer and employee, or independent contractor, or del credere agent, because, after all, the words "del credere agent" may sound ominous, but all they mean is a factor who guarantees the account and is [fol. 2805] held responsible for it, which is a del credere factor.

In the last analysis, in each of these cases we have to determine what the relationship is. If they are mere agents, and with no more status than an employee, well, then one conclusion is arrived at if they are not, or if, by reason of their position, regardless of the contracts that you made them sign, they would have certain rights by the particular contracts, but then the question arises whether these very contracts are not the ones that will cause the restraint in a field in which you have no right.

Mr. Paradise: Yes.

The Court: Because if that were true, you will remember that under the second one they allege it is the contracts which result in the monopoly. So the government does not solve it so simply, but they say that these particular contracts tie it down, and that is the very objection of the government, and that is where the Clayton Act comes in.

Mr. Paradise: May I add a few words concerning that?

The Court: Yes.

Mr. Paradise: I think it is the theory of the government, and I think it can be demonstrated to be fallacious, that one of the factors of the alleged violation here involved is the factor of control. I say that must be fallacious for this reason that: Is control ever more present or present to a greater degree than a master-servant or employer-[fol. 2806] employee relationship? And yet in those cases, as your Honor pointed out, in the Standard Oil Company case, there is no question of violation of the antitrust laws. The control is admitted. The control does not make it a violation. There is no market.

The Court: I made that statement, but Mr. Dixon never conceded that. He never conceded it in the trial, and I remember at one time John Hall got up and pointed to him and said, "Aren't you willing to concede that we own those stations and we have certain rights?" He said, "I am not ready to concede it." He said, "I am not ready to concede it. We will get to those later. We are concerned with those that you don't own." Isn't that correct?

Mr. Dixon: Correct, your Honor.

The Court: But I will say this, however, that I am starting with the premise, that is, that we are trying this law suit at the present time with the premise that an employer-employee relationship would determine the type of control

you are claiming here as to your exclusive supply contracts. We will start with that. But I am not bound by the theory of the government. Even in the Standard Oil Company case I didn't sustain some of their theory. They wanted a declaration that the restrictive contracts were invalid per se, and I didn't go that far. I merely held they were invalid if they resulted in restraint, that they are not invalid per se.

[fol. 2807] Mr. Paradise: May I mention one more word before I close, your Honor?

The Court: Yes.

Mr. Paradise: I don't think this would cover more than a couple of paragraphs.

Your Honor mentioned that it may be necessary at the conclusion of this case to determine what is this relationship by its dominant characteristics, or what it is defined, or to call it something.

I don't think that is necessary, and I would like to state that quite simply. I think once you have several relationships present at the same time, and here we have a lease and this, called a lease, and at the same time we sell this man products. We could have him in there both as a lessee and also as an employee, or agent, and, actually, if I were in it, if instead of Richfield it was myself personally, and the man also might have another relationship, he might also be my cousin, but none of those factors is important.

The factor that I think we are looking at in this case is the realistic one, the economic realistic one, as to whether, under all of these circumstances, this is a market, and if it is not a market, and if the man is not an independent businessman, the antitrust laws do not apply.

The Court: All right. I think this is a good place to stop. I think we understand one another.

[fols. 2808-2811] Now we will listen to evidence for about another week before we indulge in a talk fest, such we have indulged in this afternoon.

10:00 o'clock tomorrow morning.

(Whereupon, at 5:10 o'clock p. m., Thursday, May 24, 1951, an adjournment was taken until 10:00 o'clock a. m., Friday, May 25, 1951.)

[fol. 2812] Friday, May 25, 1951. 10:00 A. M.

The Court: All right, gentlemen.

Mr. Paradise: Mr. King, will you resume the stand, please?

WILLIAM G. KING (Recalled)

Direct examination (Resumed).

By Mr. Paradise:

Before I proceed in the topic at which we left this matter yesterday, Mr. King, I would like to call your attention to a matter of your testimony yesterday afternoon. You were asked the question whether a service charge was charged by Richfield's credit and accounting department in connection with loans to L-O operators. And your answer was, and I quote:

"A nominal charge, a flat charge. I believe it is $25."

Mr. King, was that answer precisely correct?

A. No. I have since found that it is not. That was a charge that we made some few years ago. That charge has since been increased to a flat amount of $50. It works in this manner: If the dealer leaves us——

Q. You are referring to the L-O operator?

A. If the operator leaves the station prior to the time that amount has been amortized at the rate of seven per [fol. 2813] cent per annum, the balance is then returned to him. Othe.wise that is the maximum amount that he pays or charge that he pays for the loan.

Q. You mean there are circumstances where a refund is made to him out of that advance charge?

A. Well, for example, if we loaned him a thousand dollars, interest at seven per cent for one year would be $70. If he left the station at the end of six months, he would have a refund of $15 coming to him.

Q. Is that Richfield's practice?

A. That is Richfield's practice.

Q. Now, I think at yesterday's recess there was an un-

answered question. I had asked you concerning—I will repeat the question to you, Mr. King. It was this:

> "Mr. King, referring now to the volume of gasoline, the gallonage sold in L-O stations, do you know whether the average gallonage per L-O station has increased or decreased since the end of the war, and I am speaking of World War II?"

and your answer was, and I quote:

> "Yes. Our records will show that the average gallonage of our L-O service stations has increased very substantially since the end of the last war."

I asked you whether you knew the approximate percentage of increase, and your answer was:

[fol. 2814] "Slightly in excess of 50 per cent."

I asked you if that was all L-O units of Richfield, and I intended to state, "on an average," and your answer was:

> "That is of all L-O stations."

Did you mean on an average basis?

A. Yes, that is the average of all L-O stations that I was referring to.

Q. Do you know, Mr. King, what the average gallonage in an L-O station was as of the end of World War II, stated in terms of gallonage, approximately?

A. It was approximately sixty-seven or sixty-eight hundred gallons.

Q. Do you know the approximate gallonage of L-O stations on an average basis as of the present time?

A. Last year or 1950 I believe the average was approximately 10,300 gallons.

Q. I see. I then asked you the question:

> "To what do you attribute that increase, what factors?"

and Mr. Dixon raised an objection, which, your Honor, has not been ruled upon.

The Court: Read the question again.

Mr. Paradise: That appears on page 1720, your Honor.

The Court: In view of what I said yesterday, I will [fol. 2815] sustain the objection, not merely on lack of foundation, but absolutely as irrelevant because, if I allowed that, then we would have to go into accountancy and economics and try to account for the increase, when they are entering into a domain which is beyond the scope of inquiry in this particular case for the reason I indicated in the very elaborate discussion in which we indulged last night.

Mr. Paradise: In the discussion we had last night, your Honor, it concerned the question of over-all economic benefits or detriments. The relevance of this particular question does not pertain to that at all, which, as I mentioned yesterday afternoon, I recognize and acknowledge fully is not relevant in a case of this sort.

I would like to call the court's attention to the fact that the Government as a part of its case asked its L-O operators uniformly whether there was an increase of gallonage at those respective stations, and attempted to bring out through the testimony of those L-O operators that that increase was due to their personal efforts.

I anticipate, unless counsel for the Government tells me that that is not correct, that they are going to use that as the basis for an argument and part of their contention that that will be an element in their contention that those men were independent businessmen.

The Court: Let us assume that your interpretation is correct, nevertheless, you cannot counteract specific evi- [fol. 2816] dence of an increase by general evidence, except insofar as you may show, as you already have, that there was an increase. And that, you asked without objection. You said: "Do you know the approximate percentage of increase?" The answer: "Slightly in excess of 50 per cent." That statements shows an increase.

But assuming that there is evidence in the record of which it can be claimed that the increase is due to individual effort, although I frankly do not remember any such evidence, except in one or two instances I asked the man how he got the gallonage and he said he worked very hard to work it up, as it was so low when he got it. Then only spe-

cific evidence would counter that. A general statement of a man who sits in an office and studies there about what was the cause of the increase would not overcome the impact of specific instances.

[fol. 2817] Mr. Paradise: Well, if the purpose of the government's testimony was for the purpose of making an argument that there is an inference of independent businessman relationship because of particular efforts, it is the purpose of this testimony to refute that and to show that the increase was due to other factors.

The Court: I do not know that that is the purpose of the government's testimony, and the purpose is not an ingredient which determines materiality. That is in the record, and if you want to contradict it, you may contradict it, but so long as these men did not go into detail, except in one or two instances where it was made evident that a man had taken a run-down station and worked it up, I don't think we should go into that in detail. If that were true, we are in the realm of economics, and the government may introduce experts to analyze the entire industry and try to contradict it, so we are not going to go into that. The objection is sustained.

By Mr. Paradise:

Q. Mr. King, my questions up until now have related to the L-O stations, with the exception of the questions that I have asked you concerning the organizational set-up of the home and division offices, and the duties of the salesmen and merchandisers, respectively. I turn now to a different topic, and that is the dealer stations. Now, we have had [fol. 2818] testimony in this case that there are two types of dealer stations with which Richfield has written contracts. One we have referred to as the 337 type of transaction, and the other the 3-C type of transaction.

Now, you have referred in your prior testimony to independent service station dealers, and for the purpose of reference, will you tell me what persons you are talking about?

A. These independent service station dealers?

Q. Yes.

A. I am talking about those dealers who either own their place of business or lease it from others.

Q. Does that include any persons, such as L-O operators, who may lease stations from Richfield?

A. No, that excludes them. In other words, they would lease it from others than Richfield, of course.

Q. Now, does Richfield make written contracts with any of such persons, whom you have called independent service station dealers, on any basis other than the 3-C transaction or the 337 transaction?

A. No, sir.

Q. What factors determine which of those two types of deals is offered by Richfield to independent service station dealers?

A. The competition that we encounter when we solicit the business of a particular dealer.

Q. Will you describe the nature of that competition, and [fol. 2819] how that affects this problem as to which transaction is used?

A. Well, competition may and does include everything from discounts below the posted price, to the loan of service station equipment, to the loan of money, to propositions involving repairs or improvements to the dealer's place of business. Where one of those items is encountered, we endeavor to secure the business on the basis of our 337 contract, but where we have to make some investment in the service station in order to meet competition and to acquire the business, then we endeavor to negotiate it on the basis of our 3-C proposition.

Q. Now, confining our questions for the time being to the 337 type of transaction, what documents does Richfield sign with the independent service station covering the sale of products?

A. We sign only the 337 covering the sale of products.

Q. Mr. King, I call your attention to Government's Exhibit 5-D, which is entitled, "Richfield Oil Corporation Sales Contract, Form 337," with a print date of 8-48, and ask you if that is the instrument to which you just referred.

A. It is.

Q. Now, are there any other written instruments executed with the 337 dealer between Richfield and that dealer?

A. In the event that the dealer wants the station painted [fol. 2820] in Richfield colors, then we enter into a paint agreement.

Q. Mr. King, I show you Government's Exhibit No. 5-E, entitled, "Painting Agreement," Form 59, with a print date of 8-48, and ask you if that is the instrument you refer to as the painting agreement that is sometimes entered into with the 337 dealers?

A. It is.

Q. Now, calling your attention to the sales contract, Exhibit No. 5-D, is the nature of the dealer's obligation to buy petroleum products from Richfield fully expressed in that contract?

A. Yes, this contract calls for the dealer buying and Richfield selling a minimum quantity of gasolines, lubricating oils, and greases, and with a maximum established, limiting the maximum amount of those products that Richfield is obligated to supply in the event the dealer desires to buy in excess of the minimum, as stated in the contract.

Q. What do you understand to be the dealer's obligation under that contract?

A. His obligation is limited to the purchase of the minimum quantities as established in the contract.

Q. Now, has Richfield made any agreement with any dealer, any 337 dealer, either under that form of contract, or any prior issue of that Form 337, or any agreement, oral [fol. 2821] or written, under which the dealer agreed or obligated himself to purchase gasoline or lubricating oil or grease in excess of the specified quantities set forth in that 337 form of contract?

A. No, sir.

Q. When you testified earlier in this case as a witness called by the government, you mentioned some instructions which were given in 1948, I believe you said, concerning the manner in which the quantities were to be filled in in that form of contract. Will you state, Mr. King, when those instructions were given, and what those instructions consisted of.

A. I believe it was on or about August of 1948 that, on advice of our legal department, following Judge Yankwich's decision in the Standard Oil case, that I issued in-

structions to our organization that in negotiating a 337 contract, the minimum quantity of gasoline inserted in the contract could not exceed 85 per cent of the dealer's known past sales. Subsequently, and I believe early in 1950, those instructions were changed to provide that the minimum quantity of gasoline could not exceed 75 per cent of the dealer's known sales.

Q. Now, prior to August of 1948, had any instructions been issued to the personnel in the marketing department, that is to say, the salesmen, the sales end of it, as distinguished from the merchandisers, who had nothing to do with this,—had any instructions been issued to your sales [fol. 2822] personnel concerning the manner in which the quantities were to be inserted in sales contracts, and I am speaking of this 337 form?

A. Well, prior to 1948 our instructions to our representatives were to insert a quantity of gasoline in the contracts, a figure that was reached by mutual agreement between the dealer and our representative.

Q. You mentioned that the painting agreement, this Exhibit 5—what is it—5-F?

A. 5-E.

Q. —that the painting agreement, 5-E, is sometimes used with the sales contract. Will you state whether or not it is always used with the sales contract?

A. In answer to your question, no, the painting agreement is not used every time we enter into a 337 contract. It is only when the dealer desires that the station be painted, in which event the paint contract is negotiated.

Q. Now, Mr. King, I call your attention to page 28 of Government's Exhibit 26-A, and that page contains data which Richfield furnished to the government in response to a subpoena duces tecum, and which data has been stipulated to be true for the purposes of this case.

On that page, Mr. King, there appear several columns of figures, with explanatory notes as to the significance of the various columns. It appears that the fourth column [fol. 2823] represents the total number of 337 contracts as of the end of each of the yearly periods referred to in the most left-hand column. From the explanatory note it appears that the first column of figures represents—let's take

the figures for the year 1950, and the explanatory note referring to column 1 indicates that there were 267 337 sales contracts in effect as of the end of 1950, without any accompanying paint agreement at all.

The next column, under No. 2, has the figure 853, and the explanatory note No. 2 indicates that that reflects the total number of 337 sales contracts in effect as of that date, which were accompanied by painting agreements signed concurrently with the 337 sales contracts.

The third column, where the figure 241 appears, is explained by footnote 3, and it appears from that footnote that that figure is the total number of 337 sales contracts in effect as of that date where a painting agreement was issued subsequent to the execution of the sales contract.

Will you explain, Mr. King, the circumstances under which sales contracts are made without any accompanying painting agreement at all, either at the time of the sales contract or at a subsequent time, which would explain the 267 337 sales contracts appearing in column No. 1.

[fol. 2824] A. Painting of the service stations, as you know, is a practice that has been developed by competition. And generally speaking, when a dealer decides to buy your product he wants his station painted in the identifying colors of his supplier for advertising value and for the preservation and maintenance of his place of business. In some cases the dealer demands more paint than we feel that we can furnish. In other words, the cost of paint is, in our opinion, excessive in relation to the volume or the amount of products he may purchase from us. In such cases we either reduce, or we reduce the amount of painting we will do to a figure that is satisfactory to us and to the dealer, or else maybe no painting is agreed upon and the station may remain unpainted. Sometimes the station is possibly a place of business like maybe a garage or a combination garage and service station, where the facilities do not lend themselves to this painting. There could be other circumstances where our sales contract has expired, and the station has previously been painted and the dealer is satisfied with the appearance of the station and he does not demand any more paint, so there is no paint contract considered.

Q. The explanation, then, for column No. 1, do I understand from your statement that those are stations which may or may not have been painted in Richfield colors at a prior time?

[fol. 2825] A. Yes.

Q. The column No. 2 represents a number of sales contracts, 337 sales contracts, when a painting agreement was executed concurrently with it. It is so explained in the foot-note. The third column indicates that, as of December 31, 1950, there were 241 of these sales contracts on form 337 where there was no painting agreement entered into at the time the sales contract was made but a painting agreement was entered into at a subsequent time. Will you explain the circumstances that bring that about?

A. Well, it is quite possible that the station may have been previously painted in Richfield colors. We renewed the sales contract with the dealer but he did not desire additional or a new paint job, as we could call it, until some later date, and at which time when he did want it, why, we were agreeable to doing the work necessary.

Q. Has Richfield required that dealers enter into painting agreements as a condition to Richfield making a sales contract with the dealers?

A. No. The painting agreement, entering into a paint agreement is not a requirement concurrently with entering into a sales contract.

Q. Has Richfield required that these independent dealers have their stations painted in Richfield colors as a condition to Richfield's willingness to sell gasoline to them under [fol. 2826] a 337 sales contract?

A. No, that is not a requirement.

Q. Mr. King, will you refer to the painting agreement form that you have before you? Referring to Government's Exhibit 5-E, Mr. King, paragraph 2 provides:

> "That Richfield shall paint the aforesaid service station buildings at the above location and furnish the necessary work, labor and material therefor at a cost of not less than $——— nor exceeding $———."

The following paragraph provides:

"That the dealer"——

and I won't read all the language, but it provides that the dealer under certain stated circumstances will repay to Richfield the actual sum expended by Richfield under paragraph 2, "not exceeding, however, the maximum price therein set forth," stated in that paragraph, "together with a reasonable sum as attorney's fees in the event suit is instituted by Richfield to collect said sum, or any part thereof." Will you tell me what is Richfield's purpose in providing in the painting agreement for reimbursement for the painting cost under any of the circumstances referred to in that paragraph? And I ask you to read the paragraph to refresh your recollection as to the circumstances under which the dealer may be required to pay the painting cost?

[fol. 2827] A. The paint contract is to protect our investment in the cost or in the money that we have expended to paint this dealer's station. The average station costs anywhere from five or six hundred up as high as $1,200 or $1,500 to paint. All and all the aggregate reqresents a very sizable expenditure on the part of Richfield. In the event the dealer should break his contract to purchase the fixed quantity of gasoline that he has agreed to or, in other words, if he stops buying our gasoline, this contract gives us the right to collect for the cost of the paint job.

Q. The form 337 sales contract that you have before you also provides, I believe, for a right on the part of the dealer to terminate the contract at any time on 30 days notice. I will state that it is my understanding of paragraph 3 of the painting agreement that if the dealer terminates on 30 days notice before the expiration, that Richfield also under the painting agreement has a right to collect under the painting agreement?

A. Yes. If the dealer exercises his termination notice and ceases to purchase our products, then under our paint contract we would have the right to collect for the expense of painting.

Q. Is it Richfield's purpose to collect the painting cost if the dealer purchases the quantity of gasoline which he has agreed to purchase under the contract?

[fol. 2828] A. No. If the dealer fulfills the terms of the contract, why, we consider our paint costs have then been amortized.

Q. Paragraph 1 of the painting agreement form that you have before you reads as follows—this is one of the agreements by the dealer—

> "That dealer shall remove from the surface of the service station which is to be painted all signs, insignia, and obstructions, so that the obligations of Richfield hereunder may be performed with a minimum of hindrance."

Do you know the purpose of that clause? Or, I have forgotten whether you were asked that question by Mr. Dixon originally.

A. I believe I was, and I replied at that time that I did not know the purpose of the clause.

Q. Mr. King, calling your attention to that paragraph 1 of the painting agreement, Government's Exhibit 5-E, will you tell me what has been Richfield's practice with respect to any discussions or suggestions with the dealers—and I am talking about independent dealers operating under 337 sales contracts—concerning the display of competitive signs of the nature of Lube Oil signs, for example, or tires?

A. Well, the display, it is entirely at the discretion and it is the privilege of the independent dealer to display [fol. 2829] any signs that he elects. Richfield simply, as a supplier of certain quantity of his petroleum products, does not attempt to exercise any direction or control over the signs that he may or may not display.

Q. This paragraph does say that the dealer shall remove from the service station all signs, insignia, and obstructions. Does that have reference to curb signs or lubricating oil signs of that nature?

A. Oh, no. This would only be——

Q. To what signs would this refer?

A. This would refer only to signs that are attached to the surfaces that we must paint.

Q. And what surfaces are those?

A. That would be the walls of the service station building, the canopy, the restroom facilities, the structure itself.

Q. Is any painting accomplished on the area of the service station ground itself, the blacktop or asphalted area?

A. Oh, no, no.

Q. To your knowledge are competitive signs generally displayed in 337 dealer stations?

A. Yes, I would say that the vast majority of our 337 accounts display competitive signs of some description.

Q. Under what circumstances, Mr. King, has Richfield [fol. 2830] sought collection under these painting agreements?

A. Only where the dealer has cancelled the contract prior to its expiration or has ceased buying our products.

Q. Has Richfield ever attempted to collect on the painting agreement in any situation where the 337 dealer purchased from Richfield the quantities of gasoline specified in the sales contract or failed to purchase from Richfield the quantities of lubricating oil or grease specified in the sales contract?

A. No, sir.

Q. I will ask you the same question relating to a situation where the dealer has purchased from Richfield the quantities of gasoline specified in the sales contract and, at the same time, has purchased competitive grades or brands of lubricating oils or greases such as Pennzoil, Quaker State, MacMillan or any other? If my question was not clear, the question related to: Has Richfield ever attempted to collect on a painting agreement in any such situation?

A. No, sir.

Q. Has Richfield ever attempted to collect on the painting agreement in any situation where the dealer—I am speaking of 337 dealer. I want you to bear that in mind here on all these questions—where the 337 dealer has purchased from Richfield the quantities of gasoline specified in the sales contract and has also purchased, at the same [fol. 2831] time, additional quantities of gasoline from one of Richfield's competitors?

A. No, sir.

Q. Has that situation arisen, to your knowledge, within the past 10 years where a dealer has installed in one or more pumps in his service station the gasoline of another

supplier and, at the same time, wanted to continue to buy Richfield gasoline?

A. I can't recall any such situation as you describe. Our experience has been that when a dealer has decided to no longer handle our gasoline, that he just stops buying our products entirely. We are through.

Q. Do these forms that you have before you, Government's Exhibit 5-E and 5-F, respectively, that is, the sales contract on form 337 and the painting agreement on form 59, constitute the entire agreement between Richfield and the 337 dealer, excepting, of course, in those instances where no painting agreement is made with the dealer?

A. Sales contract 337 and the paint contract are the only agreements that we use with the 337 class of dealer.

Q. Other than those written agreements has Richfield made any oral contract or agreement or understanding with any 337 dealers?

A. No, sir.

Q. Has Richfield made any oral contract, agreement or [fol. 2832] understanding with any 337 dealer by which the 337 dealer has agreed to restrict the brands of petroleum products handled by him to those brands designated or approved by Richfield?

A. No, sir.

Q. Has Richfield made a written contract with any 337 dealer pertaining to the sale of automotive accessories?

A. No, sir.

Mr. Paradise: I believe it is stipulated, is it not, counsel, that Richfield has made some direct sales to a few number of service stations? I have forgotten the particulars.

Mr. Dixon: You mean 337's?

Mr. Paradise: Yes.

Mr. Dixon: Yes.

Mr. Paradise: I have forgotten. Does that pertain to 337? I will have to check that statement. I know it refers to direct sales to service stations, but I do not know the type of service stations. I will check that during the noon recess. I am informed that it refers only to the L-O type, but I will also ascertain to make sure that that is a true statement.

Q. Has Richfield made any oral contract, agreement or understanding with any 337 dealer by which the dealer has agreed to restrict the automotive accessories handled by him to the brands designated approved by Richfield?

[fol. 2833] Mr. Dixon: Is that written contract?

Mr. Paradise: Here, I asked for oral. He said he had no written contracts before.

Mr. Dixon: I do not think the question is quite proper.

The Court: I beg pardon. I do not think he should be asked such a leading question. How would he know the oral contracts made if there are some made?

By Mr. Paradise:

Q. Do you have any knowledge of any? Has it ever been reported to you?

The Court: Yes, that is better.

The Witness: Repeat your whole question.

By Mr. Paradise:

Q. Oral contract, agreement or understanding between Richfield and any 337 dealer by which the dealer has agreed to restrict the automotive accessories handled by him to brands designated or approved by Richfield?

A. I have no knowledge of any such arrangement, oral or written.

Q. Do you have knowledge of any or has there ever been reported to you any oral contract, agreement or understanding with any 337 dealer by which the 337 dealer has agreed to acquire from sources designated by Richfield all or any of the automotive accessories sold at his service station?

A. I do not know of any.

Q. Have you given any instructions as to whether or not any such oral contracts, agreements or understandings may [fol. 2834] or may not be made by your subordinates

A. I have issued instructions that no oral agreements are to be made, and that the entire agreement between Richfield and customer must be represented by our customary contracts provided for that purpose.

Q. Are those the instructions that you referred to yes-

terday in connection with these charts of authorized signatures?

A. Yes, sir.

Q. What contact does Richfield have with the 337 dealer after the sales contract on this form 337 has been signed?

A. Our salesman who negotiated the contract continues to contact that customer to retain his goodwill and his business, and in addition to that, our tank truck driver who delivers products is also a contactor for that individual.

The Court: You have reached a stopping point. Do you want to recess now while you are looking at your papers?

Mr. Paradise: Yes, that would be fine, your Honor.

The Court: Gentlemen, I have been taking some of the papers under consideration. What is the citation of the Columbia case? I do not have it handy just now.

Mr. Dixon: I believe it is 337, Judge.

The Court: What?

Mr. Dixon: I believe it is in 337. If I had my black book [fol. 2835] here I could tell you.

The Court: No, it is not 337. I have 337. I thought it was there, too.

Mr. Paradise: 334 U. S. 495.

The Court: 334, all right. I am bringing out some of these cases that we might need so we won't be talking from memory.

We will take a brief recess.

(Short recess.)

[fol. 2836] The Court: All right, gentlemen.

By Mr. Paradise:

Q. Mr. King, paragraph 20 of the government's complaint in this action states as follows:

> "Defendant"—and that means Richfield Oil Corporation—"inspects, polices and supervises the activities and sales of the independent service station operators of the 2600 service stations involved herein, to make certain that no petroleum products or automotive accessories except those designated by defendant are sold, stored, or handled by the independent service station operator in the service station operated by him."

That sentence, as written, refers to those L-O stations, and 337 and 3-C stations. Confining your answer to the 337 stations, will you state whether or not Richfield has ever inspected, policed or supervised, to your knowledge, the activities or sales of the 337 dealers to ascertain whether any petroleum products or automotive accessories except those designated by Richfield are sold, stored or handled by the 337 dealer at his service station?

A. No, sir.

Q. Has that ever occurred, to your knowledge?

A. It has never occurred, to my knowledge.

Q. What has been Richfield's experience with respect to [fol. 2837] the success which Richfield's competitors have had in securing the business of 337 dealers under a written contract with Richfield?

Mr. Dixon: I object to that question, your Honor.

The Court: Read the question.

(The question was read.)

The Court: I don't know, but I think it is a little broad. I think you should specifically call for knowledge of dealings by competitors with the product rather than talk about success generally.

Mr. Paradise: I see. Thank you. I will reframe the question.

By Mr. Paradise:

Q. Mr. King, do you have knowledge of whether or not 337 dealers under a contract with Richfield have commenced buying gasoline from competitors, either during the term of their contract with Richfield, or subsequently, and when I say "subsequently," I mean at the expiration of the term.

A. Yes, we have——

Mr. Dixon: May I have the question again, please?

(The question was read.)

Mr. Dixon: I think the question is a split question, and I suggest to counsel that it be broken down.

The Court: Let's see if he can answer it generally, and then you can break it down.

[fol. 2838] The Witness: Yes, we have had experience where dealers have ceased buying our products prior to the end of the contract, and in other cases where the contract has been fulfilled, at the end of that time, why, they have decided to purchase their products from another supplier.

By Mr. Paradise:

Q. In those situations where a dealer has discontinued buying all gasoline from Richfield prior to the expiration of a 337 contract, has that occurred only in situations where the 337 dealer had signed a 337 sales contract and no paint agreement? Do you understand my question?

A. I am going to ask the lady to read it.

(The question was read.)

Mr. Dixon: If the court please, I am going to have to object to that question and ask that counsel confine the question to specific instances, in support of his previous answer.

The Court: Overruled.

The Witness: We have experienced both where 337 dealers, or dealers under a 337 contract with or without paint agreements, have stopped purchasing our products.

Mr. Paradise: Are you speaking of discontinuance prior to the expiration, or at the expiration of the 337 sales contract?

The Witness: I am speaking of prior; prior to the ex-
[fol. 2839] piration of the contract.

By Mr. Paradise:

Q. Under what circumstances has Richfield terminated 337 sales contracts prior to the expiration of the term for which they are written

A. The only time that we would terminate, or exercise our termination privilege, prior to the termination of the contract, would be where the dealer had ceased buying entirely from Richfield, in which event we would then exercise our termination privilege, so as to effect collection under the paint contract, if one was in existence with that dealer. Otherwise, we would automatically cancel the agreement so as to clear our files of inactive contracts.

Mr. Dixon: I didn't get that last statement. Will you read it please.

(The portion of the answer referred to was read.)

By Mr. Paradise:

Q. The procedure for clearing files of inactive contracts under the circumstances you mentioned is by the giving of a notice of termination, under those circumstances?

A. Yes.

Q. When in point of time are those notices given, in relation to the time when the dealer has continued or discontinued purchases of any gasoline from Richfield?

A. Not until he has entirely stopped buying our product.

Q. Do you have knowledge of any situation where Rich- [fol. 2840] field has terminated any 337 sales contracts where the dealer continued to buy gasoline from Richfield but failing to buy the agreed quantity specified in the contract?

A. No, I have no knowledge of that. It would be quite unusual to cancel out a customer under those circumstances.

Q. To your knowledge, has Richfield ever terminated any 337 sales contract or contracts in any station where the dealer continued to buy gasoline from Richfield, but at the same time bought and handled at the station a non-Richfield gasoline?

A. I have no knowledge of such.

Q. Has any such situation arisen in the past 10 years?

A. I do not recall of any.

Q. I mean where those physical facts have occurred?

A. I do not recall of any situation like that.

Q. To your knowledge, has Richfield ever terminated any 337 sales contract in any situation where the dealer continued to buy gasoline from Richfield, but has failed to buy from Richfield the quantity of oil or grease specified in the contract?

A. No, sir.

Q. I will repeat the same question, that is to say, has Richfield ever terminated a 337 sales contract in variously different situations, without repeating the question as to termination, that is, the situation where the dealer has [fol. 2841] bought some lubricating oil from Richfield and

has bought lubricating oils and greases from various other competitors of Richfield, Quaker State, Pennzoil, Standard, Union, Hy-Vis, et cetera?

A. No, sir.

Q. Has Richfield ever terminated the contract where the dealer has continued to buy some gasoline from Richfield, but has discontinued completely the purchase from Richfield of any lubricating oils or greases?

A. No, sir.

Q. Do you have knowledge of any situation where Richfield has terminated any 337 sales contract in any situation where the dealer either purchased, stocked or sold any petroleum products other than Richfield?

A. No, sir.

Q. Or where he displayed them?

A. No, sir.

Q. Or where he had signs of competitors', displaying them,——

A. No, sir.

Q. —or advertising them?

A. No, sir.

Q. Do you have knowledge of any situation where Richfield has terminated any 337 sales contract in any situation where the dealer has purchased, stocked or sold what has been referred to here as approved tires, batteries and ac- [fol. 2842] cessories, and by that I mean tires, batteries and accessories approved by Richfield for sale on its credit cards?

A. I would ask you to read that question, please.

(The question was read.)

A. That is a long question.

Q. Maybe my question was too complex, Mr. King. I will break it up. As a short-cut, we have referred to approved tires, batteries, and accessories as those approved by Richfield for sale on its credit cards. Now, my question is: Do you have knowledge of any situation where Richfield has terminated any 337 sales contract, where the dealer, the 337 dealer, either purchased, stocked or handled tires, batteries, or accessories other than Richfield approved tires, batteries or accessories?

A. No.

Q. Do you have knowledge of any situation where Richfield terminated any 337 sales contract under circumstances where the dealer purchased, stocked or sold approved TBA, but bought it from a source other than a Richfield TBA distributor?

A. No.

Q. Has Richfield ever attempted to control the operations of any 337 dealer with respect to the manner of the operation by the dealer of his station, or the manner of his dealing [fol. 2843] with his customers?

Mr. Dixon: I object to that, your Honor, as obviously calling for the conclusion of the witness, and that is a matter to be determined by the court, I think, and not by this witness.

The Court: I thought he was asking for knowledge. Will you read the question?

(The question was read.)

The Court: If that is modified as to his knowledge then it is all right.

Mr. Paradise: I will so modify it.

The Court: All right.

By Mr. Paradise:

Q. Do you have knowledge of any such attempt by Richfield or any of Richfield's employees?

A. I do not.

Q. Do you have knowledge of any attempt by Richfield, or any of Richfield's employees, to control the operations of a 337 dealer insofar as it concerns the cleanliness of his station or the maintenance of it?

A. No, we do not. The only knowledge I have of that is that, naturally, our sales representative would call to his attention, or could call to his attention some deplorable or detrimental situation in the hope he might correct it, so as to improve his business.

Q. As a sales aid?

[fol. 2844] A. As to a sales aid, but if the dealer did not care to follow our suggestions, that is where the matter stops.

Q. Is that similar in the situation of an L-O station?

A. No.

Q. Do you have knowledge of any attempt by Richfield or any of its employees to control the operations of any 337 dealer with respect to the hours of opening or closing of his station?

A. I have no knowledge of any direction along those lines.

Q. Or with respect to the wearing of uniforms?

A. We suggest to these dealers that they wear it constantly, the Richfield service station operators' uniform, but if they do not elect to wear it, why, that's where it stops.

Q. With respect to the handling by the dealer of non-Richfield gasoline and non-Richfield lubricating oil or grease?

Mr. Dixon: What is the question, counsel?

Mr. Paradise: Does he have knowledge of any attempt by Richfield or Richfield employees to control the operations of any 337 dealer in the respects I mentioned, that is to say, with respect to the handling by the dealer of competitive lube oil or grease?

The Witness: The answer is no, I have no knowledge.

[fol. 2845] By Mr. Paradise:

Q. Do you have knowledge of any situation in which Richfield has attempted to control the operations of any 337 dealer with respect to the source from which he purchased TBA merchandise?

A. No, sir.

Q. Mr. King, I show you Plaintiff's Exhibit 9, which is a yellow carbon copy of a letter bearing the date at the top June 16th, and then there is the numeral "8." I believe when you testified earlier in this case, you stated that that was received by you in 1938 rather than 1948. Is that correct, just to refresh the matter?

A. Yes, sir.

Q. You were one of the parties to whom that letter was addressed. At that time what was your position with the defendant corporation?

A. Manager of the Southern Division.

Q. That letter refers to split pump accounts, and to expedite this, I think you have already defined a split account as

a service station handling at the same time the brands of gasoline of several different supply companies, one or more different supply companies. Do you have a recollection of the number of split pump accounts, as so defined, which Richfield had at the time of that letter?

A. I recall that we didn't have—or, I recall that we had approximately twenty-odd so-called split pump accounts.

[fol. 2846] Q. Are you referring to the entire operations of the company?

A. No, I am referring to the Southern Division, of which I was manager.

Q. Do you have knowledge of the number throughout the entire operations of the company?

A. It would be in proportion of that. It would probably not exceed 40 or 50 such accounts.

Q. In total?

A. Yes, sir.

Q. Now, pursuant to or after the receipt of that letter to which I have directed your attention, what was done with respect to those 40 or 50 accounts?

A. We withdrew from those accounts, pursuant to these instructions.

[fol. 2847] Q. Was any public announcement to the trade made by Richfield in connection with that withdrawal?

A. Not that I know of.

Q. The instructions which are embodied in that letter, have they continued in effect from that time to today, up to today?

A. Well, the contents of the letter or the instructions in time became meaningless. They had no—they were of no effect.

Mr. Dixon: If the court please, I do not believe that answer is responsive to the question.

The Court: Well, that is all right.

By Mr. Paradise:

Q. Will you state what you mean by their becoming meaningless and when did they so become meaningless?

A. Well, in explanation of my answer I refer to the change in the buying habits of the public which influenced the buying habits of service station dealers to the point

where the vast majority of dealers preferred to specialize on the products of one supplier.

Q. When did that change or effect occur, to your knowledge?

A. Well, as I recall, the transition started back in the thirties, and I would say that by just prior to the last war probably 98 per cent of service station dealers were operat-
[fol. 2848] ing their stations on the basis of specializing or handling the products of one supplier.

Q. In your opinion, Mr. King, what factors have influenced such desire on the part of this 98 per cent of such dealers?

Mr. Dixon: I certainly object to that question, your Honor.

The Court: Well, all right. I will overrule it. But please consider that, as an expert, he may give his opinion. Go ahead.

The Witness: Just read the question.

(Question read by the reporter.)

A. Well, it is my opinion and it is my experience that the average motorist recognizes that he has a large investment in his automobile, probably the most expensive thing he owns outside of a home, and it has been the tendency on the part of the majority of motorists to give their business to those service station dealers who maintain and operate a good station, giving adequate service, careful service, and because the public has become, I would say, educated through the years by advertising to have a preference as to the products that they buy and they have greater assurance in patronizing a station specializing in the product of their preference, because if there is any mechanical failure to their car, if there is any dissatisfaction on their part, they
[fol. 2849] feel that they have more grounds for recovery of damages if damages exist, and so on.

By Mr. Paradise:

Q. In your opinion, has that attitude of the buying public which you have just mentioned reflected itself in the buying practices of these 98 per cent of independent service station dealers?

Mr. Dixon: The same objection, your Honor.

A. Yes, indeed, that has been our experience that by far the vast majority of dealers prefer to operate their stations on that basis, and to pick a supplier of their choice and to specialize on the products of that supplier.

By Mr. Paradise:

Q. When you testified here earlier in this case you mentioned in response to Mr. Dixon's questions Richfield current policies. I ask you does Richfield now solicit the business of the particular dealers who are presently operating split pump stations?

A. No. As a matter of practice and policy we are not soliciting the business of that type of dealer.

Q. Will you state what your reasons are for not making that solicitation?

A. We do not solicit that type of business because——

Q. I am talking about these particular dealers, this two per cent or less of dealers whom you have testified are in existence on the Pacific Coast and currently operating stations, split pump stations.

[fol. 2850] A. Yes, that is what I refer to. We are not soliciting that type of dealer for the reason that they generally and in most cases do not measure up to the standard of representation that we would like to have either in the service station facilities that they present, the type of service that they can give the public, the manner in which they are operated, and frequently because of their selling a gasoline at prices which are below the prices that Richfield directs on its product.

Q. On the other hand, does Richfield solicit the business of any independent dealer on the basis of the dealer's agreement or understanding that he buy all of his gasoline requirements from Richfield?

A. No, sir.

Q. I believe you testified earlier that you know of no independent dealer—and I think the question was so broad as to include not only the 337 dealers whom we have been talking about but also 3-C dealers, and I am speaking of the present time—who are handling Richfield gasoline and who, at the same time, are handling the gasoline of one

of Richfield's competitors. Do I correctly summarize your testimony?

The Witness: Well, I would like to have it read over.

(Question read by the reporter)

By Mr. Paradise:

Q. I see I have put so many qualifications in that, Mr. [fol. 2851] King, that it might be difficult to answer. Is this a correct summary of your former testimony—and this was in response to a question by Mr. Dixon—that you know of no instance in which an independent dealer, 337 or 3-C, who is handling Richfield gasoline and is also, at the same time, handling the gasoline of one of Richfield's competitors?

A. I have no knowledge of such a situation today.

Q. In your opinion, Mr. King, why has that result occurred?

Mr. Dixon: I object to that question.
The Court: Overruled.

A. Well, it is my opinion, as I expressed here a few minutes ago, that the vast majority of dealers today are catering to the buying habits of the public who prefer to patronize stations specializing in the products of some one company. And it has further been our experience that if a dealer becomes dissatisfied with Richfield, either our service or products, that he just cancels his contract and we are entirely through at his station.

By Mr. Paradise:

Q. In your opinion, has that situation occurred voluntarily or at the requirement of Richfield or of any other oil company? I will forget "any other oil company." That is not involved. In your opinion, has that situation occurred as a result of the desire of these 337 or 3-C dealers or as the result of a requirement or act on Richfield's part? [fol. 2852] Mr. Dixon: The same objection, your Honor.
The Court: Overruled.

A. No. That is the prerogative of the dealer, of the class of dealer that we are speaking about. If he sees fit to stop purchasing from Richfield, why, certainly he can do so. We have found out that they do it whether they have a contract or not.

Mr. Paradise: Your Honor, I am about to turn to a different subject matter, if your Honor considers this an appropriate time to stop.

The Court: All right, 2:00 o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Friday, May 25, 1951.)

[fol. 2853] Los Angeles, California, Friday, May 25, 1951.
2:00 P. M.

The Court: All right, gentlemen.

William G. King, called as a witness by and on behalf of the defendant, having been previously sworn, resumed the stand and testified further as follows:

Direct examination (Continued).

By Mr. Paradise:

Q. Mr. King, before we leave the subject of the 337 dealer stations, are any instructions given to the dealers in the 337 stations with respect to tires, batteries and accessories,—instructions of any nature?

A. Yes, 337 dealers are instructed as to Richfield's approved list of TBA items that it is proper for those dealers to charge on Richfield credit cards.

Q. Is it a correct statement, to expedite this, Mr. King, to say that when a dealer sells any of these approved items on credit cards issued by Richfield, that the dealer may use the credit ticket in lieu of cash in buying petroleum products from Richfield, and that Richfield assumes the full credit collection from the purchaser?

A. That is provided the sale has been made on a card that has not expired.

[fol. 2854] Q. Mr. King, I hand you a red folder entitled, "Credit Card Regulations," and ask you if this embodies the instructions on the subject-matter of approved TBA and credit cards?

A. Yes, it does.

Q. This particular instrument, I see, is dated June 1, 1950. Have prior editions of this also been issued?

A. Yes, sir.

Q. To what persons are these credit card regulations issued?

A. These credit card regulations are issued to our lease station operators, and all Richfield independent dealers operating under either one of our two forms of sales contracts.

Q. Then these credit card regulations are not applicable to just one of the three types of dealers?

A. No, to all service stations handling our products.

Mr. Paradise: May I offer this as Defendant's next in order?

The Court: It may be received.

The Clerk: Defendant's Exhibit Q in evidence.

(The document referred to was marked Defendant's Exhibit Q, and was received in evidence.)

By Mr. Paradise:

Q. Now, Mr. King, coming perhaps to one of our last subject-matters, the 3-C stations, I think you described this morning the reason for entering into a 3-C transaction in-
[fol. 2855] stead of a 337 transaction. Will you describe now what constitutes a 3-C transaction, as you understand it?

A. The 3-C proposition consists of a lease from the dealer to Richfield and a lease back from Richfield to the dealer, together with a sales contract to accompany the sublease to the dealer.

Q. Those respective forms are designated Form 362, a lease by the dealer to Richfield; Form 668, the sublease by Richfield back to the dealer; and Form 783, the operator's sales contract; is that not correct?

A. I believe those are the form numbers.

Q. I just identify those for the purpose of the record. Those three instruments are executed, are they not, all as a part of one transaction?

A. Yes, sir.

Mr. Paradise: I ask leave of court and counsel to ask leading questions here just for the purpose of clarifying this.

Mr. Dixon: No objection.

By Mr. Paradise:

Q. Now, is the obligation of the 3-C dealer under this sales contract, which is Form 783, the same as the obligation of the 337 dealer, under the 337 sales contract with respect to his obligation to purchase petroleum products?

A. Yes, sir.

[fol. 2856] Q. I call your attention to the fact that as to the 3-C sales contract the form of it was changed in 1948. Mr. King, I show you Government's Exhibits 4-B and 4-C. Both of them are entitled "3-C Operator's Sales Contract," and they are both on Form 783, by the way. Form 783 bears a print date—well, on this copy it is illegible, but it is prior to 1948.

Mr. Dixon: 7-45, counsel.

Mr. Paradise: Is that what it is?

Mr. Dixon: Yes.

By Mr. Paradise:

Q. Exhibit 4-C bears a print date of 8-48. I call your attention to the difference in the provisions of paragraph 1 relating to the obligation of the dealer to purchase gasoline and other petroleum products. Will you state just briefly what differences there were in those two forms—or, may I withdraw that? Is it not correct, Mr. King, that the form of sales contract which was in use prior to the reprint of August of 1948 required the dealer to purchase his entire requirements of petroleum products?

A. That is correct.

Q. During what period was that form in use by Richfield?

A. This form was in use from the inception of this par-

ticular contract, which was first used in about 1945, and this form was in use up until about the middle of 1948.

Q. Now, what was Richfield's purpose in requesting the [fol. 2857] dealer to purchase his entire requirements during that period?

A. Well, as I have previously pointed out, this proposition is used only in those instances where Richfield, as a result of competition, must make some investment in the service station, and it was our feeling that that was a reasonable request to make, a reasonable contract to write.

Q. When you wanted the dealer to purchase his entire requirements, you so stated in your printed form of contract, is that correct?

A. That is right.

Q. What change was made in 1948?

A. In 1948, following Judge Yankwich's decision in the Standard Oil case, upon the advice of our legal department I issued instructions to provide that this sales contract would call only for a stated quantity of gasoline which quantity would not exceed 85 per cent of the dealer's known requirements.

Q. Is it correct that the provisions relating to quantities, that is to say, that the printed form, regardless of the instructions as to how the quantities were to be arrived at —that the printed form as revised in 1948 was made similar to the printed form 337?

A. Yes, they are identical.

Q. Did the legal department advise you as to the reasons for its request that you make that change?

A. Well, as I point out, it was following Judge Yank- [fol. 2858] wich's decision in the Standard Oil case, that it was naturally felt that the exclusive provision of the sales contract that we were then using would be illegal.

Q. Following the issuance of those instructions and the printing of this new form of sales contract what was done with respect to the 3-C sales contract then in existence?

A. Our representatives were instructed to amend all existing sales contracts by mutual consent with the dealers involved, to the point where the entire requirements provision was eliminated and the specific quantity provision was substituted.

Q. Do you know whether negotiations to effect that result were undertaken by your personnel?

A. I did not hear your question.

Q. I say, do you know whether negotiations to effect that result were undertaken by your personnel?

A. Oh, yes. We managed to so amend all of the existing 3-C propositions, with the exception, I believe, of it was either three or four, where the dealer in question for one reason or another declined to make changes.

Q. Subsequent to the issuance by you of those instructions in the fall of 1948 and the issuance of that new form, has Richfield, within your knowledge, entered into any contract, agreement or understanding, either oral or written, with any independent service dealer under a 3-C transaction under which the dealer has agreed or obligated him-
[fol. 2859] self to restrict the brands of petroleum products or automotive accessories which are handled by him to those brands designated or approved by Richfield?

A. No, sir.

Q. Or whereby the dealer has agreed or obligated himself to purchase or acquire from sources designated by Richfield all automotive accessories sold at his service station?

A. No, sir.

Q. It is correct, is it not, that those forms of 3-C sales contract, as well as the 337 form of sales contract, either before or after the alteration of the form, covered nothing but petroleum products, and did not cover automotive accessories?

A. That is correct.

Q. Within your knowledge, Mr. King, has Richfield ever attempted to terminate the sales contract of a 3-C dealer and, at the same time, retain a leasehold interest in the 3-C dealer's station?

A. No, we never have.

[fol. 2860] Q. What contact does Richfield have with the 3-C dealer after the written contracts have been signed?

A. Our sales representative or salesman, as we call him, who originally negotiated the deal continues to call on the account, to retain the account's good will, and to insure the continuance of our business relations, and, in

addition, our tank truck salesman who delivers products to the account is another contact.

Q. Now, without referring to the exhibits, let me refer to this fact: There has been testimony, Mr. King, that with respect to a station held by Mr. Moore in Medford, Oregon, that Mr. Moore held a 3-C sublease from Richfield, and a 3-C sales contract, but that the lease to Richfield was from a Mr. George Field, someone other than Mr. Moore. Calling your attention also to a different transaction, there was a witness called by the government, a Mr. Colmery, and Mr. Colmery likewise held a 3-C sublease on a Richfield form, and a 3-C sales contract with Richfield, but Richfield held its lease not from Mr. Colmery, but from the property owner as to two stations there involved. I would like to ask you if that type of transaction is typical of the 3-C transaction, as you have described it.

Mr. Dixon: I object to that, your Honor. It calls for the conclusion of this witness.

The Court: He can testify what the general type of trans-[fol. 2861] action is, if he knows, but to pick out a particular man and call that to his attention and ask him whether it is characteristic calls for a conclusion.

Mr. Paradise: Perhaps so.

The Court: You can ask him if there are many transactions of that type, that he knows of.

Mr. Paradise: Yes. Thank you, your Honor.

By Mr. Paradise:

Q. Are there many 3-C transactions, Mr. King, where the lessor to Richfield is a party other than the lessee from Richfield?

A. No, they are decidedly few, and, to my best knowledge, I don't suppose there are over three, or four, or five, and that is a decided exception to the customary 3-C transaction.

The Court: What makes them an exception? What causes that fact? Is it your desire to have the landlord in, or is it because he wants it that way, or what? Do you know?

The Witness: Well, yes, I think I can explain that to your Honor. Customarily we are dealing with an independ-

ent dealer who either owns his place of business or has a lease on it from some other party, so our entire transaction in, we will say, 99 per cent of the cases is between the dealer and Richfield. It is a lease and a sublease.

Now, to further illustrate the situation, Mr. Paradise brought up or mentioned the Colmery deals. You might be [fol. 2862] interested in knowing how they developed, as an exception.

Mr. Colmery acquired during the war leases on two pieces of vacant real estate, and he had the obligation under those leases to build a service station as soon as building restrictions were removed.

He found, when the time came, that he couldn't finance the building of the stations on those two pieces of property, and yet he was very anxious to go into the service station business at those locations, which he considered to be quite valuable.

He came to Richfield, and Richfield agreed to build stations on both properties. Instead of taking an assignment of the basic lease, or the lease that he had with the property owners, a new lease was written between the owners and Richfield, and then we, in turn, subleased back to Mr. Colmery.

The Court: You assumed the obligation that he had formerly had?

The Witness: Yes, sir.

The Court: To build stations?

The Witness: Yes, sir; and, in turn, to sublease the service station, the property, back to him. I bring that out to show why it is an exception to the routine.

The Court: I wanted that brought out. That is why I pointed out to Mr. Paradise that you can point out to me the facts, and then I myself can determine why the [fol. 2863] pattern was departed from.

By Mr. Paradise:

Q. Mr. King, on Friday of last week there was a witness called by the government, a Mr. Robert J. DeLonge, who testified that he was the lessee of a Richfield L-O station in Olympia, Washington, known as the One Stop Service Station, and he leased it from Richfield on a Form 542.

He also testified during the course of his examination, if I recall his testimony correctly, that during the second month of his tenancy, the commission agent, a Mr. Kisor, came to Mr. DeLonge and told him that it was customary for the operator in that particular station to pay the local commission agent, who happened to Mr. Kisor, the sum of $100 per month rent over and above what he was paying to Richfield. This witness, Mr. DeLonge, also testified that Richfield didn't know anything about this, and that this was a personal transaction between him and Mr. Kisor. I want to ask you if this testimony of Mr. DeLonge has been brought to your attention.

A. Yes, it has.

Q. When, and by whom?

A. By Mr. DeMartini.

Q. When did that occur?

A. Following that information,——

Q. I mean, when was this brought to your attention?

A. I believe it was Monday of this week.

[fol. 2864] Q. I would like very much to have you explain to the court what you have done with respect to that matter since learning that information.

A. I personally called Mr. Kisor on the telephone at Olympia, Washington. He, as you know, although he was, is no longer our commission agent at that point, and he hasn't been for several years, three years, in fact. He is still a TBA distributor and heating oil distributor.

I called Mr. Kisor and told him about Mr. DeLonge's testimony, and asked him if he would verify and tell me if he had or had not collected rent from DeLonge, while he was a lessee of ours in that particular station. The next day, after he had consulted his accountant and examined his books, in answer to my question he admitted that he had collected rent from DeLonge at the rate of $100 per month, while he was at that station.

Q. Did you take any further steps following that discussion?

A. Yes, I have. I have already issued instructions that Mr. DeLonge—or, that Mr. Kisor is to be terminated as our TBA distributor, and that his contract as a heating oil distributor will be terminated as soon as it can be done,

and, in addition, our representatives in the Northwest have instructions to contact Mr. DeLonge and determine how much rent he paid to Mr. Kisor, and Richfield will reimburse him for every cent that he paid under that arrangement. [fol. 2865] Q. When was Mr. Kisor last commission agent for Richfield, how recently?

A. He has not been a commission agent since about the middle of 1948.

Q. There is just one other subject matter I would like to question you concerning and that is the subject matter of Richfield's interest in TBA which we have referred to in this case as an abbreviation for tires, batteries and accessories. Will you describe rather briefly the nature of Richfield's activities in tires, batteries and accessories, when they started and what the purpose of it was?

A. Richfield is naturally interested in giving complete service to its customers at the greatest number possible of our service stations. Complete service means more than the sale of gasoline and lubricating oils. It includes the ability or the privilege or the opportunity of the customer to purchase all of his car requirements at a Richfield station. In addition, we are interested in seeing that our dealers and our operators increase their income, as we know that they cannot have a successful operation solely on the profits to be derived from the sale of petroleum products. So in order to do this, Richfield carefully examined the various TBA products on the market and selected what we considered to be the most representative and the finest quality products, whether they be tires or batteries or automotive accessories, or of one kind or [fol. 2866] another.

Q. Did you make any investigations concerning quality?

A. Oh, yes. In other words, our people charged with that responsibility investigated the various makes and types of equipment and, as a result of that, we established what we call Richfield's approved list of TBA items.

Q. In the selection of the type of items which would go on this list or the particular items which would be included in this list was any consideration given to the responsibility or guaranty of the particular manufacturer involved?

A. Well, naturally, that was an important part of our

decision to select the items we did, representing, as they do, the products of reputable manufacturers who stand behind their products and who would guarantee their performance and quality.

Q. Richfield obtains a profit, does it not, with respect to the TBA, the approved TBA sold either directly by Richfield to service stations or by Richfield to TBA distributors?

A. Yes, sir.

Q. That is correct, is it not?

A. Yes, sir.

Q. And that profit takes the shape of both a margin between a purchase price and sales price with respect to some items, and a commission with respect to other items? [fol. 2867] A. Yes, sir.

Mr. Paradise: For the purpose of the record, I might say that in Government's Exhibit——

Mr. Dixon: 26-A

Mr. Paradise: —26-A, in response to the subpoena duces tecum Richfield has shown and there is attached a list of a few—I think some 26-odd—service station dealers to whom Richfield has made direct sales, and also the volume in terms of dollars of tires, tubes and batteries of the direct sales to those few dealers.

Q. Mr. King, what is the reason, if there is one, for those direct sales to those particular dealers?

A. Those where we have made such arrangements directly with the dealers is brought about by the fact that those dealers are such large operators. In other words, they sell such a large volume of TBA items that they are entitled in the trade to the best possible proposition.

Q. In other words, they get approximately the same discount that the TBA distributor himself would get?

A. That is right.

Q. Is that right?

A. Yes, sir.

Q. Other than those particular stations which are listed in paragraph No. 11 of Government's Exhibit 26-A to [fol. 2868] whom does Richfield sell the approved TBA?

A. To appointed or designated TBA distributors.

Q. Reference is also made in Government's Exhibit 26-A—I do not recall the precise subdivision of it—to the

fact that those TBA distributors have advised Richfield that approximately 30 per cent of the quantity of tires, batteries and accessories purchased by those TBA distributors from Richfield have been sold by them to service stations other than service stations handling Richfield petroleum products, that is to say, to other than Richfield L-O stations, 3-C stations, or the 337 stations. Is there any difference between the L-O stations, on the one hand, and the 3-C and 337 stations, on the other hand, Mr. King, with respect to the Richfield's practices concerning approved TBA items?

A. Yes, there is a difference.

Q. Will you state what that is, please?

A. In the case of the operators, of our L-O stations, they are directed by our representatives to handle a representative line of our approved TBA items. In the case of our 337 and 3-C dealers they are instructed as to the TBA items—they are told, rather—they are told about the approved items on the TBA which they are privileged to sell upon Richfield credit cards. In other words, they are told what they can charge on our credit cards. Naturally, we suggest and we hope that they will stock those items, [fol. 2869] but if they do not elect to do so, why, that ends the matter.

Q. One, and perhaps the final, question. The 3-C transaction as you have described it involves generally a lease to Richfield under which Richfield is the lessee and a lease by Richfield to the operator. The lessor under the lease to Richfield is generally, as I understand it, the same person as the operator. You have also testified that there is a type of L-O station under which Richfield is the lessee from a person other than the operator and that Richfield has installed an L-O operator in that station. Would you state whether there is any difference in result with respect to that situation insofar as termination of the lease to the operator is concerned?

A. Yes, there is a difference. In the case of where Richfield leases a service station property from other than the dealer, why——

Q. That is, the L-O station you are referring to?

A. That is the L-O station I am referring to. —why, in

that instance we sublease to the operator on a lease that is subject to mutual cancellation on 24 hours notice. That differs from the 3-C proposition, where the lessor is the dealer and we lease from that dealer and sublease back to him concurrently for the same period of time.

Q. My question was directed, however, to the result of the termination of the lease by Richfield to the operator. [fol. 2870] A. Well, we can terminate that lease on 24 hours notice.

Q. I did not mean so much as to the nature of the right to terminate, but the effect of termination. Upon termination of the sublease to a 3-C dealer who thereafter continues in occupancy of that station?

A. The dealer who originally made the lease to us.

Q. And on termination of the tenancy of an L-O operator who remains in occupancy of the station?

A. Richfield.

Mr. Paradise: No further questions.

Cross-examination.

By Mr. Dixon:

Q. Mr. King, I do not think it is too important to the issues of this case, but I believe you had testified to the effect that you built, that is, Richfield built refining facilities during the war which it did not need in order to serve the Government, at its cost, is that correct?

A. Yes, that is correct.

Q. I presume those projects or the construction of such additions as to make your refinery capacity were made under the Defense Production Act, was it, if you know?

A. I do not know, because that is not under my jurisdiction.

Q. I appreciate that. Can you tell the court, if you know, whether or not Richfield amortized any costs that were [fol. 2871] incurred in construction of that project under the five years provisions of the Act?

Mr. Paradise: I might state that we will provide a witness who is qualified on that.

Mr. Dixon: I am just asking if he knows.

The Court: He wants the fact of whether he knows.

A. No, I do not know, Mr. Dixon, because that, as I repeat, is not my authority.

By Mr. Dixon:

Q. In other words, you are not familiar with that. The only thing you know about it is that those facilities were constructed and are used by Richfield in producing products which you sell to the consuming public?

A. Yes.

Q. I believe you testified somewhat at length concerning Defendant's Exhibit O, which purports to deal with the persons who are authorized to sign certain documents for Richfield. Does that apply, as far as authority is concerned, Mr. King, only to anything that is in writing insofar as Richfield is concerned?

A. That authority or that chart that we have discussed, Mr. Dixon, clearly designates those individuals who have the authority to execute on behalf of the corporation certain documents.

Q. Any document that is in writing, I think, is that correct?

[fol. 2872] A. Any document that is in writing.

Q. Did you or anyone under your supervision ever put out any comparable chart of instructions with reference to the authority of anyone under your supervision concerning oral arrangements which they might enter into?

A. No, sir.

Q. On behalf of Richfield?

A. No. Never have any instructions been issued which would authorize anyone in Richfield's employ to enter into an oral contract. In fact, just the contrary, the instructions have been that no oral agreements are to be entered into and that the only agreement—and that all details of any agreement between Richfield and a customer are limited to what is contained in the contracts or documents that were executed with that party.

Q. I am particularly interested, Mr. King, in any written instructions that you may have given to anyone under your supervision or connected with the company to that latter effect. Did you ever give any such instructions in writing?

A. I cannot recall the exact time, but I am positive that—

I feel positive that instructions have been issued in writing to our representatives that no representations, promises, or any agreements are to be made orally, and that everything that is to be binding upon Richfield is to be contained in the document that is executed.

[fol. 2873] Q. So that if you gave any instructions, would you be able to submit them to the court and make them a part of this record?

A. Yes.

Q. And will you endeavor to ascertain whether you have any copies of such contracts in your file, Mr. King, and if you have any, will you make them available to the court, through your counsel?

A. I will do that. I would like to say here that instructions have been issued, or, are issued orally from time to time throughout the years to our responsible managers and other representatives, clearly pointing out to them that they are to confine their remarks or their negotiations to conform to the terms of our contracts.

Q. I was asking, Mr. King, only for any written instructions that you circularized among anyone who was under your supervision or negotiated with your dealers.

A. Yes, sir.

Mr. DeMartini: If I may interrupt you, Mr. Dixon, there is such in evidence now.

Mr. Dixon: You mean this Exhibit O, counsel?

Mr. DeMartini: Yes, sir.

Mr. Paradise: Do you want it pointed out?

By Mr. Dixon:

Q. I will ask Mr. King. I am sure he can point it out to us. Do you find any instructions of the type you have just [fol. 2874] suggested were given, Mr. King, on your examination of Defendant's Exhibit O? (Handing document to witness.)

A. Well, I think what counsel refers to here is the paragraph to the effect that when any of the agreements under item H, which are the marketing department agreements——

Q. And if I may interrupt you, those items under item H

are the written agreements described under that item H; is that correct?

A. Yes, they are written agreements, and there are instructions here to the effect that when the agreement contains unauthorized alterations or insertions in conflict with the printed provisions of the form or in violation of the established company policy, that it must be presented to my office before it can be executed.

Q. I see. That, then, is what you regard as the equivalent of instructions to all members of your staff or your department concerning the authority to enter into any kind of an agreement, written or oral, is it not, Mr. King?

A. Well, I am positive, Mr. Dixon, that our instructions during the years, oral or otherwise, have been quite explicit to our various managers on how they are to negotiate agreements on behalf of this company.

Q. Now, your company does sell a rather substantial amount of gasoline and other petroleum products to the con- [fol. 2875] suming public, does it not?

A. Yes.

Q. And some of those sales are made for resale purposes to the operators of so-called service station outlets, are they not?

A. You are referring now to what we call the independent dealers?

Q. No, I am referring to any service station outlet of the type referred to as an L-O, 337, or 3-C type of outlet.

A. Oh, we sell gasoline to all those three classes of operators and dealers.

The Court: In other words, you have no direct sales, retail sales, have you?

The Witness: If you mean through a company-operated station, no. That was brought out in my previous testimony, your Honor.

The Court: Well, there are instances where you sell direct, don't you? Or do you? Don't you sell direct to these boats in the harbor?

The Witness: Yes, but I think Mr. Dixon's question was aimed at what we call resale.

The Court: No, any resale, regardless of outlet.

The Witness: Yes, we have several, what we call marine

stations, but they are not operated directly by the company. They are usually what we call a dealer, under a contract, or [fol. 2876] they are operated by what we call a commission agent.

The Court: All right. I don't know where I ran into it, but I think it was in one of the maritime cases that I learned about these boats that go out and furnish gasoline.

The Witness: Yes, there are. Some of our competitors do have what they call the refueling barges to refuel pleasure boats. We don't have anything like that, but we do have small craft stations, operated either by dealers or by commission agents.

The Court: I see. All right.

By Mr. Dixon:

Q. Directing your attention specifically to any sales which Richfield may make to the operators of any one of the three types of outlets to which you sell for resale purposes, namely, the operators of L-O, 337, and 3-C outlets, with reference to the 337 and the 3-C outlets, I believe you testified, and the record shows, that you do have a written sales contract with the operator of such outlets. That is a fact, is it not, Mr. King?

A. We do have a written sales contract with the dealers in the case of the 3-C proposition and the 337. You call them "operators." I want to call them "dealers."

Q. All right. We won't quarrel over that. Perhaps it would be better to call them buyers of petroleum products. Is that a fair classification of the operators or dealers?

A. I think you could call them buyers, the dealers that [fol. 2877] we refer to,—dealers or buyers, yes.

Q. It is a fact, is it not, also, that the operators of the so-called L-O type of outlet buy petroleum products from your company, do they not?

A. Yes, sir.

Q. And it is also a fact that you have no written arrangement with any one of the operators of such outlets covering the terms and conditions of the purchase or sale of any petroleum products from your company; that is a fact, is it not?

A. We have no written agreement. They are told when

they are installed the basis on which they will purchase products.

Q. But, in any event, you do not have anything comparable in writing to what you have with the operators or buyers of the petroleum products at the 3-C or 337 outlets?

A. That's right.

Q. Now, who determines the price that you are going to charge the operator of the L-O outlet, for the gasoline that he buys from your company?

A. They are told that they will purchase at Richfield's published and posted prices from day to day, as it pertains to gasoline or lubricating oils or greases. We have at Richfield's wholesale plants a posting which comprises our posted tank-wagon price on gasoline, and what we call our [fol. 2878] dealer list price on automotive oils and greases.

Q. By "told" you mean they are told orally?

A. They are told orally. Naturally, they would want to know on what basis they would purchase their products, and they are told it is our posted prices, as posted by the corporation, which determines the price that they will pay.

Q. And that information is generally conveyed to them, is it not, by the merchandiser who is talking with the operator or prospective operator of the L-O unit?

A. Yes, our merchandiser tells the operator that information, and as I pointed out, that information is conspicuously posted on a bulletin board at every wholesale distributing plant where every customer, regardless of type, can see it.

Q. And that is the same price that is charged to the operator or the buyer of the gasoline who is at the 3-C and the 337 outlet, is it not, Mr. King?

A. Not always.

Q. Oh, is there a different price given the operator of your L-O outlet, or the L-O outlet, for the same quantities of gasoline that he buys, as compared with the same quantities that are bought by the operator of the 337 or the 2-B or 3-C outlets?

Mr. DeMartini: That is objected to, your Honor. Difference of price is not an element in this case.

The Court: Overruled. Go ahead.

[fol. 2879] The Witness: As I——

Mr. Dixon: I don't want to interrupt your answer, but can you answer that first either "Yes" or "No," please?

The Court: Yes, give a "Yes" or "No," and then you may explain.

The Witness: Will I be given permission to explain?

The Court: Oh, yes. Just answer "Yes" or "No," first.

The Witness: Will you read the question, please?

(The question was read.)

Mr. Dixon: I might add to that, "In the same area."

The Witness: Yes. Now, may I explain, your Honor?

Mr. Dixon: Yes, will you kindly explain the difference, Mr. King?

The Court: Yes.

The Witness: In every area in which we operate Richfield posts its wholesale, or what we call tank-wagon prices. I have previously pointed out in my testimony that in soliciting the business of independent dealers under the 337 and 3-C contracts, that we are competing for that business with all other competitors, and there arises in numerous instances the necessity of meeting a price offered by a competitor to that dealer, which extends a discount below our wholesale or posted price. Therefore, if we are to compete for that business, we have to make the decision whether or not we wish to extend that discount.

[fol. 2880] Q. Is that discount provision contained in your written sales contracts, Mr. King, with the 3-C and 337 operator, or is that a matter of oral arrangement at the time or after the contract is entered into between Richfield and such operator?

A. No, there is no oral arrangement. Wherever it is necessary to extend that additional discount, a typewritten amendment or addition to the printed form of contract in letter form is provided the dealer, which states that in order to meet—or, that we are extending this additional discount in order to meet the competition which has been represented to us, and that we hereby extend to him the discount that was discussed between the dealer and our representative, who negotiated the contract.

Q. Is that discount provision in the sales contract made a permanent part of that contract and in effect as long as the contract is in effect?

A. It runs concurrently with the contract, and provides that it may be canceled by Richfield at any time on notice, in which event the dealer is privileged to cancel his contract with Richfield.

Q. Now, is that discount that you have mentioned given only to the operator of the L-O and the 337 outlet, Mr. King?

A. No. That discount that I have mentioned is extended [fol. 2881] only to dealers under contract with the 337 contract or with the 3-C proposition.

Q. Yes.

A. Pardon me. I retract that. The discount in the case of the 337 dealers is handled in the manner which I have described.

Q. And is it handled in the same manner with the 3-C operator?

A. No.

Q. Or purchaser?

A. No. It is handled in two ways, either in the difference between the rent that we pay our lessor under the 3-C proposition and the rent that we collect from him, or in the event that the rent paid and received is the same, then a letter is provided which calls for the additional discount that we have found necessary to extend to that dealer, in order to acquire his business, in order to meet competition.

Q. Well, it is a fact, then, that within the same area a buyer of your petroleum products, that is, gasoline, under the 3-C or the 337 type of sales contract might be paying a different price to you for the gasoline purchased from Richfield; is that a fact, Mr. King?

A. That is correct.

Q. Now, when you do that, though, you put it into the [fol. 2882] written part of the written sales contract with such operator; is that correct?

A. Yes, sir.

Q. Now, do you ever give the operator of the L-O outlet who buys gasoline from Richfield a discount over any other L-O operator in the same area,——

A. No.

Q. —who is buying gasoline from you?

A. No. Our L-O operators all purchase at Richfield posted wholesale or tank-wagon prices.

Q. I believe you testified on direct examination that you gave some of your L-O operators a discount from the price that they paid you for gasoline; is that correct?

A. No, I believe you misunderstood that, Mr. Dixon.

Q. All right. Will you correct me and tell me what you did testify to?

A. I did not say that we gave the L-O operators any additional discount. Under examination I pointed out that we did given them subsidies of various forms and I will enumerate them again. We, first of all,——

Q. Excuse me. May I interrupt you, Mr. King? I am talking now about the purchases of gasoline, Mr. King, by the L-O operator from Richfield. There are such purchases, are there not?

A. Yes, sir.

[fol. 2883] Q. All right. Now, with reference to such purchases, do you ever give the operator of any L-O outlet any rebate from the purchase price of gasoline that he buys from Richfield, which you do not give to other L-O operators in the same area, where your posted price is in effect?

A. Yes, that could—when you say "in the same area," of course, an area might be small, the same area might be huge or be a very small area.

I pointed out in my testimony that in the case where our dealer is confronted with meeting cut prices, or, I mean where our operator is confronted with meeting cut-price competition, that we will in those cases permit him, if he so elects, to reduce his price to the public to meet such competition, in which case we subsidize him to the amount of the reduction from our directed retail price.

The Court: Those are extraordinary circumstances? Other than that, do you give them any advantage in price, as comparable to other dealers working on different contracts in the same locality, say?

The Witness: Let me try to explain that to you, your Honor. All L-O operators are billed at our posted wholesale or tank-wagon price in effect for that area.

The Court: Yes.

The Witness: As I have testified here, we do go so far as to entirely eliminate their rent at times, which you might

[fol. 2884] interpret as being a discount or a reduction from the posted tank-wagon prices.

The Court: Other than those matters which are resorted to under special circumstances, do you give them any preference at all in billing the prices which you bill him? You see, both Mr. Dixon and I have tried to get an answer to that and to get an explanation. I am not trying to trap you.

The Witness: I understand.

The Court: And I know he isn't.

The Witness: No.

The Court: Or if he is, I am not aware of it, and I usually know.

Mr. Dixon: Thank you, your Honor.

[fol. 2885] The Witness: In answer to your question, the L-O operator is given no discount below our posted tank wagon price, but he is given the relief, the subsidies that I have heretofore mentioned.

The Court: All right.

The Witness: Such as rental abatements and/or subsidies in order to meet cut-price competition.

The Court: All right. Then, subject to those limitations or exceptions, he is billed at the same price which is set for all outlets at the particular time?

The Witness: Yes, sir.

The Court: Well, that is a summary of it.

By Mr. Dixon:

Q. Is that the same sort of action, Mr. King, which is taken with the L-O operator, as you have described, that is taken with the 3-C and 337 operator or purchaser of gasoline from Richfield?

Mr. DeMartini: I object to that as being ambiguous. I do not understand the question.

Mr. Dixon: I think it is clear.

The Court: What are you getting at?

Mr. Dixon: I am trying to find out, your Honor, whether this action which the witness testified was taken with reference to rebates in the sales contracts of 3-C and 337 operator is of the same kind that is given with reference to the L-O operator.

[fol. 2886] The Court: He has given us the exceptions and

you want to know if those exceptions are made to apply to the other type of dealers?

Mr. Dixon: That is correct.

A. I have heretofore pointed out or told you that we will give 3-C dealers and 337 dealers discounts from the tank wagon price where we find it necessary in order to meet competition and in order to acquire their business. Where we do not have to meet competition, they purchase their products at our posted tank wagon price.

By Mr. Dixon:

Q. Mr. King, that is not my question. I am sorry, but——

The Witness: Well, maybe I did not understand you, sir.

Q. I hate to take any further time to go over the matter, but it is a fact that you do enter into the written sales contract with the 3-C and the 337 operator, and after the contract has been signed and in effect, a modification of that by nature of a rebate or a reduction in the price charged him for the gasoline which he purchases over other buyers of the same amount of gasoline in the same area?

A. If I understand your question——

Q. Do you understand my question?

A. I am going to try to answer it.

Q. Thank you.

The Court: Go ahead.

[fol. 2887] A. If I understand your question correctly, when we negotiate either one of those two contracts that you have mentioned we are confronted with this competition and we write into the agreement at the time it is executed by or signed by the dealer, we write into the agreement at that time the discount which we have found necessary to provide to meet competition to acquire that business.

The Court: But he wants to know whether any other discounts are made available to him which are not in the written agreement for the purchase of supplies.

The Witness: No, sir. I can answer that.

By Mr. Dixon:

Q. I believe you testified, Mr. King, that in order to help the L-O operator along you did give him this discount or rebate or whatever you want to call it in certain areas, at certain times, where the situation was what you call competitive, is that a fair statement?

A. Yes. I think I would like to clarify your question.

Q. No, it is not a question now. I am asking you if you stated that.

A. Yes. We give him this subsidy that I have pointed out to you in order to enable him to meet competitive situations.

Q. Do you also give that to other purchasers of your gasoline buying from you under the 337 and 3-C type of sales contract in the same area, at the same time?

[fol. 2888] A. No.

Q. So that you do not give, then, to the purchaser under the 3-C and the 337 sales contract the same discount or rebate, as we have referred to it, as you give to the L-O operator at the same time, in the same territory, is that a correct statement?

A. Does your question apply in order to meet competition?

Q. I am assuming that the conditions are the same, in the same territory, at the same time, yes.

A. The answer is no.

Q. I believe you testified that Richfield purchases the fee of some of these L-O outlets or acquired the underlying lease of some of these L-O outlets to which you sell gasoline and petroleum products to supply an outlet and a market for your production. That is, the production of gasoline and petroleum products was the goal which you were aiming at, is that correct, Mr. King?

A. Yes, sir.

Q. So that there is a market, then, which is represented by these L-O outlets to which you are selling petroleum products, is that correct?

Mr. Paradise: I submit that that is argumentative.

The Court: Well, this is cross examination. All right, go ahead. He has a right to this witness' answer. You may [fol. 2889] answer.

The Witness: Would you repeat your question, please?

(Question read by the reporter.)

A. Yes, the market is there and has been represented by the vast increase in the market resulting from the increase in population in this area.

The Court: But you would call it a preempted market, would you not?

The Witness: Preempted market?

The Court: You know what "preemption" means?

The Witness: I would like to have your interpretation.

The Court: Well, it is just an ordinary word. You have preempted it, just tied it up, the L-O market has tied it up.

The Witness: No. I would say the L-O market was created by the erection and building of our stations. The demand for the products was there, your Honor, and the only way we could participate in that demand for the product would be to erect this outlet to catch some part of it.

By Mr. Dixon:

Q. But you could participate in that demand, could you not, Mr. King, by operating that station directly and selling your petroleum products and gasoline directly to the consumer or purchaser?

A. Do you mean by operating that station as a——

Q. Company-operated outlet.

A. —a company-operated outlet.

[fol. 2890] The Court: Through a company outlet or through an employee.

The Witness: Yes, they could be operated in that manner.

By Mr. Dixon:

Q. But that is not the manner in which the L-O operates?

The Court: Well, that is argumentative.

Mr. Dixon: All right, your Honor.

The Court: You are arguing now. I have to walk in on that situation.

By Mr. Dixon:

Q. And it is a fact, is it not, Mr. King, that this L-O market for gasoline in the year 1950 was in excess of $23,000,000?

The Witness: Read that question.
Mr. Paradise: This is argumentative.
The Court: You have the figures.
The Witness: Read the question, please.

(Question read by the reporter.)

A. I am unable to place any answer on the value of the products sold through the L-O stations.

The Court: Well, I presume the stipulation so states. All right.

By Mr. Dixon:

Q. And that that figure of $23,000,000 that I have just mentioned, assuming that to be the amount of the sales, represents the purchasers of petroleum products from Richfield at the L-O outlets, does it not, Mr. King?
[fol. 2891] A. Well, as I answered you, Mr. Dixon, I am——
Q. Assuming the figures to be that?
A. Oh, assuming your figure to be correct, that would represent the value of Richfield's sales to the operators of Richfield's L-O service stations.
Q. And those sales are generally made on a cash basis at the time of delivery, are they, Mr. King?
A. Yes, a cash basis.
Q. And that is the same term of sale as is enjoyed by the purchaser of gasoline under the 3-C and 337 type of sales contract?
A. Yes. All those dealers buy on a—they pay cash for their deliveries with, I will say—oh, there might be one per cent exceptions to that where a dealer may have some credit.
Q. Now referring further to your arrangement with the operator of the L-O outlet, the lessee, I believe you have called him in your form 146——
I will ask that this be marked for identification as Government's Exhibit No. —

The Clerk: Government's Exhibit 27 marked for identification.

(The document referred to was marked Plaintiff's Exhibit 27 for identification.)

By Mr. Dixon:

Q. I will hand you, Mr. King, what has been marked as [fol. 2892] Government's Exhibit 27 and ask you to examine the same and state to the court whether you find anything therein which refers to any instructions, written instructions or report for written instructions that are to be made by your merchandiser at the time there is a change of lessee at one of the L-O outlets.

A. Well, this form 146, that is a form that is——

Q. That is Government's Exhibit 27.

A. Government's 27 is the form provided our merchandisers when there is a change of operators at an L-O service station. This is simply a check sheet or a reminder sheet for him, to remind him to cover in detail certain items with the outgoing operator and other items with the incoming operator.

Q. Yes.

A. You will notice on here that there is an item covering the actual physical inventory which must be checked, the question of whether certain utility bills have been paid, the TBA program explained, and other items like that. It is really a check list to make sure that everything is thoroughly explained.

Q. All right. Now, that is the report which is filled out and made by the distributor and which is turned in by him to his superior to be made a part of the file in connection with the entire transaction with the L-O operator, is that a fact?

[fol. 2893] A. I believe you possibly use the word "distributor" by mistake.

Q. I do not mean "distributor."

A. This form is made out by our merchandising representative.

Q. Yes. Thank you for the correction.

A. Does that answer your question, sir?

Mr. Dixon: No, I did not get an answer yet.
The Witness: Oh, I am sorry I didn't.
Mr. Dixon: Did he answer, Mr. Reporter?
The Reporter: Not your question.
The Witness: Will you read the question again, please?

(Question read by reporter.)

A. This is part of the file concerning both the outgoing and the incoming operator, as made by our merchandising representative.

Q. I will ask you again, Mr. King, to examine the same and indicate, if you will, please, where the operator is to report to his superior on that form with reference to any instructions given the incoming operator concerning the terms or conditions under which he purchases petroleum products.

A. There is one item here. It says: "Order placed for or lessee supplied with petroleum products." And there is another item here of explanation of recommended prices on merchandise. And I assume that during the discussion on [fol. 2894] those matters that our representative—I say "I assume"—I am sure that our representative at that time acquaints the incoming operator with full information as to where he will place his orders for all petroleum products and the prices which he will pay for them.

Q. And it is, of course, explained to him that he is to acquire such products solely from Richfield, is that correct, at that time?

A. He is told what petroleum products he is to handle at the station, yes, sir.

Q. And those products that he is told he must handle are the Richfield products, are they not?

A. At the L-O station, yes, sir.

Q. And nothing else?

A. Yes, sir.

Q. And that is also true with reference to the TBA items that may be covered under "TBA program explained," is it not?

A. He is told to stock a balanced list of our approved TBA items. However, as I have pointed out in the previous testimony, he does in many instances handle items over and above that list.

The Court: But not competitive items?

The Witness: Yes. At times, many times or at times I have seen competitive items in these stations, too, which [fol. 2895] they may handle in addition to a complete line of our approved items. We prefer, naturally, that they handle only our approved TBA items, but there have been times when they have also handled competitive items in addition.

The Court: All right.

By Mr. Dixon:

Q. I notice also on Government's Exhibit 27 an item No. 5 concerning the incoming lessee. I presume that refers, does it, to the items that are to be taken up with the incoming lessee?

Mr. Paradise: Which items do you refer to?

Mr. Dixon: 5.

Mr. Paradise: We can't hear you over here very well, Mr. Dixon. 5?

Mr. Dixon: Yes.

Q. Is that correct? That item 5 applies to the incoming lessee, does it, Mr. King?

A. Yes, sir.

Q. And he is advised at that time as to his responsibility regarding insurance coverage for fire, theft, public liability, property damage, and workmen's compensation?

A. Yes, sir.

Q. And he is advised, is he not, at that time that that is his responsibility and not the responsibility of Richfield?

A. That is right.

[fol. 2896] Q. Now coming to item 6, lessee is advised as to reporting social security, Federal old age, income, personal property taxes, and filing return qua-terly for state sales tax. That refers, does it not, to the obligation of the operator-lessee and not of Richfield?

A. Yes, sir.

Q. And item 13 provides: "Notify TBA distributor of change of lessee." At the time the incoming lessee is installed, the merchandiser is, under that provision, to advise the TBA distributor, is he not, of that fact?

A. Naturally so, so that he, the TBA distributor, can call on him.

Q. And carry out the Richfield program?
A. And place with him our approved items of TBA.

Mr. Dixon: The Government offers Exhibit 27 into evidence.
The Court: All right, it may be received. Do you want to stop there for a short recess?
Mr. Dixon: Yes, Judge, any time it is all right.

(The document referred to was marked Plaintiff's Exhibit 27 and was received in evidence.)

The Court: All right. You may step down. I did want to tell you that when we adjourn today we will follow the practice of adjourning until Tuesday. Today is Friday, isn't it?
Mr. Paradise: Yes, sir.
[fol. 2897] The Court: I just thought I would let you know. I have a lot of things to do Monday, a short trial and two other trials, so I will be very busy.

(Short recess.)

[fol. 2898] The Court: All right, gentlemen.

By Mr. Dixon:

Q. Mr. King, referring to these Form 542 leases with the operator of the L-O outlets, a minimum per month's rental is always provided for in that lease with the operator, is it not?
A. Yes, sir.
A. A minimum at a gallonage rate, yes.
Q. I mean a specified, liquidated minimum amount is always provided for in that form lease?
A. Yes, sir.
Q. Now, that amount is always collected, is it not, when the incoming lessee's property is turned over to him?
A. You say that amount—your question is, is that amount selected at that time?
Q. No; no. The amount specified in your rental Form 542 as the monthly rent is always collected in advance from the incoming lessee, is it not, at the time the premises are turned over to him?
A. Yes, sir.

Q. Now, I believe you testified that you made some reductions in that minimum rental to some lessees under your Form 542 at various times; is that correct?

A. Yes, we have made reductions.

Q. And in some instances, I believe you testified you made them even as low as down to $1 per month; is that correct?

[fol. 2899] A. Yes, sir.

Q. You also testified that your rental that you got from the lessee under the Form 542 was generally based on one cent a gallon for all gasoline sold at the station; that is a fact, too, is it not?

A. That is the maximum rate that we collect, yes.

Q. Now, these reductions, have they been the practice of the company since the termination of the last war?

A. Yes, and even prior to that.

Q. It is also a fact in some instances, is it not, that there have been increases in the minimum rentals to be paid by the lessee under the Form 542 type of lease?

A. There have been increases, but not to exceed the rate of one cent per gallon, unless, as I have heretofore testified, there are some extraordinary facilities that have a certain value.

Q. Did you ever have any L-O outlets that did not sell more than 100 gallons of gasoline a month?

A. Well, I am afraid if they didn't sell any more than that, Mr. Dixon, that there would be a change of operator or a closed station.

Q. But you did make reductions voluntarily, as I understand it, to some lessees under the 542 lease to as low as $1 a month minimum rental; is that correct?

A. Oh, yes. Yes, indeed.

[fol. 2900] Q. And that minimum rental was also the maximum rental under those circumstances, was it not?

A. As long as we made that concession, yes.

Q. And the purpose of making that reduction to $1 minimum-maximum rental per month was to maintain that outlet, that L-O outlet, as a market for your petroleum products, was it not?

A. That is right, and to enable the operator, to give him time in order to develop or build a business.

Q. As you have expressed, to enable the L-O operator to

build up the business, that is a business of selling petroleum products which he might buy from you and sell to the consuming public through that L-O outlet?

A. Yes. It might be a brand new station, and we would throw in four or five merchandisers in the neighborhood to develop and solicit business for that station. Business does not come in a rush, you know. You do not develop the potential of a station within three, or four, or five, or six, or sometimes twelve months of time after it is opened, so that is why we make those concessions.

Q. I believe you also testified with reference to the L-O lease, that it was your view that you were turning over a valuable piece of property to the lessee of that outlet, under the 542 form of lease; is that correct?

A. Yes, I would consider it a valuable piece of property.

[fol. 2901] Q. It is a fact, is it not, Mr. King, that the 542 lease contains many provisions in writing which make certain that the lessee under that Form 542 shall maintain and keep that property in good condition and repair?

A. The lease so states. It has been our practice, that is, with the exception of normal wear and tear of the premises, you understand, and we would hold him responsible for damages to the property if abuse was used on the equipment or negligence in the handling of it.

Q. But you feel it is the policy of the company that those provisions do not adequately protect the premises or the interests of the company in the property which you turn over to the lessee?

A. That provision is to require the operator to operate and handle our property with due diligence, it is notice to him that if he abuses the property through his negligence, or otherwise, why, the repairs, and so forth,—he would be subject to the expense of the repairs.

Q. That is all provided for in the written provisions of the lease, Form 542, is it not, Mr. King?

A. There is a provision that requires he shall maintain the property in a good state of repair.

Q. Now, I believe you also testified that the L-O operator has no investment in any of the fixed assets of any of the L-O type of outlets, concerning which you have entered into [fol. 2902] a form of lease, 542; is that correct, Mr. King?

A. That is correct. He has no investment in any equipment attached to the property, affixed to the property, if that is what you mean, sir.

Q. It is a fact, is it not, Mr. King, that the lessee of such outlet has on some occasions made investments in the fixed assets of the property covered by one of the 542 leases?

A. There may have been exceptions, but very few exceptions. I have known of a few instances where the dealer has at his expense installed some cupboards or some shelving, something of that sort, but such, if you want to call them that, are very, very minor in either amount or value. But wherever anything is needed for the successful operation of that station in the way of fixed equipment, why, the company provides it.

Q. Are you familiar with the testimony given in this court room by Mr. Mills, who was one of the operators at one of these outlets covered by a 542 lease?

A. No, I am not familiar with his testimony.

Q. Are you familiar with the testimony of——

The Court: Are you talking about the man who testified concerning——

Mr. Dixon: Concerning the electrical outlets.

The Court: That wouldn't work?

[fol. 2903] Mr. Dixon: And he spent $2500.

The Court: And he spent $2500 to fix it because, he said, they wouldn't fix it.

Mr. Dixon: Yes, sir.

Mr. Paradise: Wasn't it his testimony that that was expended prior to 1937, before this company came into existence? I think that is Mr. Mills' testimony.

The Witness: If you will identify——

The Court: The only other testimony I remember is that of the man who put in a new type of hoist, a fellow who went into bankruptcy. Who was that?

Mr. Dixon: That was Mr. DeLonge.

The Court: That was Mr. DeLonge. He said he had such a tough time, and that he still owed $180, I think, on the hoist, which was washed out in the bankruptcy.

Mr. Dixon: May the record show with reference to Mr. Mills' testimony, on page 620, that this incident occurred in 1943.

The Witness: What Mills is that, Mr. Dixon?

Mr. Dixon: Mr. Harlan Mills, Harlan G. Mills.

The Witness: Well, I would like to, and I can enlarge upon that if the court will permit me to.

The Court: Go ahead.

The Witness: Mr. Mills——

By Mr. Dixon:

Q. First of all, are you familiar with that situation, Mr. [fol. 2904] King?

A. Yes, I have known Mr. Mills for——

Mr. DeMartini: I think you are mistaken about the fact that he put it in in 1943. Let's get the record straight.

The Court: All right.

The Witness: Yes. I have known Mr. Mills for many years, probably 15 years or more. We gave him permission, —we refused to do it, to make this installation, but we gave him permission to install an electric generating plant in the station, which would enable him to reduce his electric light expense. In other words he could generate his own power cheaper than he could buy it, and he originally put that equipment in on his own initiative.

It was certainly an unusual item of equipment, and I don't know of another service station that has its own electric light or power plant, unless it might be something way back in the mountains where there is no electric power.

The Court: All right.

By Mr. Dixon:

Q. In any event, did you regard that as an investment by the lessee under your Form 542 in a fixed asset?

A. Why, I will admit it is an investment by the lessee in a fixed asset, but I will also state it is a very unusual and extreme situation.

Q. Are you familiar with any of the circumstances of the [fol. 2905] testimony of Mr. DeLonge concerning the installation of a lift at the property which he leased from your company on a Form 542?

A. I am not familiar with his testimony, other than what Mr. DeMartini has told me about it.

Q. Would you regard a lift, that is, something that is used to raise an automobile up so that it may be greased by the operator of the outlet as a necessary part of the equipment of any service station serving the public?

A. Yes, it is a necessary piece of equipment, and in all L-O stations we provide that equipment. Now, I don't know the circumstances in that instance. It is quite—I can only say or assume that the operator wanted an additional piece of equipment, or something that was, in our opinion, not necessary, and went ahead on his own and installed it.

Q. In any event, as I understand it, you are not familiar with that situation?

A. I am not intimately familiar with that situation.

Q. All right. I believe you testified that you would, as you put it, terminate any operator under a Form 542 lease that didn't conform to your procedure to make him a more successful operator; is that correct?

A. Yes, we would; that is, if he did not conform to our instructions after repeated efforts to have him, why, we would consider that sufficient grounds to cancel his lease.

[fol. 2906] Q. You regard a successful operator, I presume, as one who sells or buys from Richfield an increasing number of petroleum products and automotive accessories under the L-O type of arrangement?

A. As the result of taking full advantage of the facilities which we have provided, and realizing the potential that exists at that station, I would consider him a good operator.

Q. Well, if the lessee or operator of any one of your L-O outlets under Form 542 could make more money for himself as an operator in buying competitive TBA products, for example, from sources other than through the Richfield distributor of such products, you would not regard such an operator as a successful operator for Richfield, would you?

Mr. Paradise: I object to that as argumentative.

The Court: That is argumentative. It is quite evident that the measure of success is determined by the amount of Richfield products, either produced by them or recommended by them that he sells, as to whether he built up the station. It is quite evident that every one of the operators who testified here felt that he had a personal interest in building up the business. They were proud to show the in-

crease in gallonage, and everything else. But the company, of course, insists that notwithstanding that there had to be strict compliance with the requirements as to petroleum [fol. 2907] products being limited to their products, and, also, as to TBA recommended products, so the rest is argument.

You know, they have a motion picture, or, rather, they have a program called "Queen For A Day." They had some lady come up here in court, and I don't know why, but I presume I must have been handling some case that had a popular appeal. When she was asked what she wanted to do, she said she wanted to visit my court room. So I put her on the bench beside me. It happened that her husband had been a marshal in olden days in some eastern court. So this L-O operator was a King For A Day, or an Operator For A Day. In other words, he had grave responsibilities, but they could be terminated on 24 hours' notice.
[fol. 2908] So the question for the court to determine will ultimately be what kind of a relationship that was.

By Mr. Dixon:

Q. Now, Mr. King, I believe you testified that the 3-C type of sales contract entered into with a lessee of the property leased by the operator to Richfield and by Richfield leased back to the operator contained a provision in 1937 calling for a maximum and minimum of petroleum products to be purchased by the operator of that type of outlet, is that correct?

A. No, that is not correct, Mr. Dixon.

Q. Directing your attention to Government's Exhibit 3-B——

The Court: Are you switching to a new type of station?

Mr. Dixon: Yes, your Honor.

The Court: Which one is that?

Mr. Dixon: That is 2-B, 3-C, and 337.

The Court: All right. What is the number of your exhibit?

Mr. Dixon: No. 3-B.

The Witness: Mr. Dixon, you referred to a 3-C. Perhaps you are probably thinking of 2-B.

Mr. Dixon: Yes.
The Witness: You mentioned it as 3-C.

By Mr. Dixon:

Q. I will hand you Government's Exhibit 3-B and ask you whether paragraph 1 thereof contains such a minimum-maximum provision.

[fol. 2909] Mr. DeMartini: What is the print date of that, Mr. Dixon?
Mr. Dixon: 11-37, counsel.
Mr. DeMartini: Thank you.
Mr. Paradise: Did your question relate to 1947?
Mr. Dixon: No, I did not say '47. I am sorry if I did.
The Witness: What is your question, now?

(Record read by the reporter)

A. May I retract my answer? That is correct, and this document contains what we call the 2-B proposition at that time, Mr. Dixon, rather than 3-C. But in effect it is the same kind of a proposition, a lease and sublease.
The Court: All right.

By Mr. Dixon:

Q. I believe you also testified as to the manner in which that maximum and minimum figure was determined, and stated that it was determined on the basis of 85 per cent of the estimated purchases or sales of that outlet, is that correct, Mr. King?
A. No, that is not exactly correct, Mr. Dixon. I would like to first say that that basis of computing the quantity to be inserted in the contract was not used back in 1937, if you are referring to this document we just discussed. That formula was just adopted, as I have testified here, about the middle of 1948, and is not based upon the dealer's estimated sales but is 75 per cent of his known or his past sales [fol. 2910] as determined by his records.
Q. Will you state to the court, then, Mr. King, how the maximum and minimum amounts which were specified in Government's Exhibit 3-B were determined?
A. That is the document in use in 1937?

Q. That is right.

A. That is sometime ago, but it is my recollection that the minimums and the maximums were established by mutual agreement between a dealer and Richfield, a minimum amount which he would be required to buy and a maximum amount which the company would be required to deliver.

Q. I believe you also testified that around about 1938 or 1939, when you were in charge of the southern division, that the policy of the company was to cease to supply or to eliminate any sales made to so-called split pump stations, is that correct?

A. Yes. Following instructions, we withdrew from the split pump stations we were serving at that time.

Q. In other words, if the account which you were then serving was a split pump outlet and it had a sales contract of the type represented by Government's — 3-B, it was the policy of Richfield to cancel that contract unless the operator of the 3-C outlet with whom you had such a sales contract, 3-B, agreed to purchase all of his requirements of gasoline and petroleum products from Richfield?

[fol. 2911] A. I can't recall, Mr. Dixon, our having that form of contract that we are speaking about with any split pump account.

Q. But in any event after the Dinkins memoranda, Government's Exhibit 9, Richfield did not sell any outlet to which it did not supply 100 per cent of the gasoline requirements, is that a fact, Mr. King?

A. It is true that we withdrew——

The Court: What is the number of that memo exhibit?

Mr. Dixon: Government's Exhibit 9, your Honor.

The Court: And there is a letter that goes with it, isn't there?

Mr. Dixon: Yes, 9-A.

The Court: 9-A. I mean I want to make a note.

The Witness: Would you state the question again, please?

(Question read by the reporter.)

A. As I have testified, at the time of the letter that you refer to we had approximately 20 such split pumps ac-

counts. And I do not recall that we have sold any so-called split pumps accounts since that time. As I have testified heretofore, when an account ceases or stops purchasing our products, why, he throws us out completely in favor of some other competitor.

By Mr. Dixon:

Q. And that is true, is it not, Mr. King, regardless of what provisions may be contained in the sales contract [fol. 2912] between Richfield and the purchaser of petroleum products under Government's forms 3-B or Government's Exhibits, rather 4-B, 4-C, Government's Exhibit 5, Government's Exhibit- 5-D, and 5-G?

Mr. Paradise: Oh, I ask that those exhibits be presented to the witness before he — required to answer that question.

Mr. Dixon: That is a very fair request counsel, and I just wanted to get——

The Court: You have included a large number of exhibits.

Mr. Dixon: I might say for the record, your Honor, that they comprise the form of written sales contracts which the Government has introduced as representative exhibits of the type of sales contract entered into by the defendant and purchaser of petroleum products from Richfield under the 2-B, 3-C, and 337 type of sales contracts.

Mr. Paradise: The objection relates primarily to the point of time. I think the witness' attention should be directed to the time as well as to the exhibits.

The Court: And show him the exhibits so he may look at them.

Mr. Dixon: 3-B, 4-B, 4-C, 5, 5-D, and 5-G.

(Mr. Dixon and witness conferring.)

Mr. Paradise: Is this discussion for the record?

Mr. Dixon: No. This is off the record. I am helping the witness.

[fol. 2913] Mr. Paradise: Can I hear what help the witness is getting?

Mr. DeMartini: May we have the question read before the witness answers it?

The Court: I think the witness will probably want it read.

The Witness: Yes. Would you read the question, please?

The Reporter: The question is predicated upon the previous question and answer.

(Record read by the reporter.)

By Mr. Dixon:

Q. Do you understand my question, Mr. King?

A. I think so. Certain of these contracts, namely, the 3-B and the 4——

Mr. Dixon: I do not mean to interrupt.

The Court: Just a minute. Let him finish what he wants to say. Let him finish.

A. And the 4-C and the 5 and the 5-D and the 5-G all contain minimum and maximum quantity clauses, whereas the 4-B which was used in the original 3-C proposition called for the buyer's entire requirements. As I have testified, we have had numerous dealers break these contracts and throw us out in favor of a competitior, and when we have been thrown out, we have been thrown out bag and baggage. I do not recall that we have had any instance where a dealer [fol. 2914] under one of these contracts elected to install pumps of a competitor's gasoline while at the same time purchasing our gasoline.

The Court: In other words, regardless of what became of them later on, he was handling your gasoline?

The Witness: Your Honor, he either handled our gasoline or he threw us out.

The Court: Or he threw you out?

The Witness: Yes.

The Court: But you threw yourself out.

The Witness: We were the people that were thrown out. In other words, if there is any dissatisfaction, it is our experience they do not throw us out part ways, we just stop doing business. We are told to get out.

The Court: In other words, you carried out the policy for the reasons you gave us yesterday of not having split pumps, isn't that true?

The Witness: As I told you, your Honor, with our reasons for not soliciting that split pump business——

The Court: I am not going any further into the reasons. I am talking about the ultimate fact.

The Witness: Yes.

The Court: It was not profitable and you did not want it.

The Witness: That is true.

[fol. 2915] The Court: Then any of the contracts you entered into after that aimed to achieve that object, but you did not always achieve it. You shot at it, anyway.

The Witness: Sure, that we proposed to sell them all of the gasoline they wanted to buy, but our contracts have not required them to buy all our petroleum products. We hope that we will be good enough sales people that he will like us well enough that he will buy all of his gasoline from us.

By Mr. Dixon:

Q. In the sales contract forms that I have referred to you mentioned the fact that one of them contained a specific requirement to the effect that the purchaser would buy all of his petroleum requirements, namely, Government's Exhibit 4-B which was entered into in November of 1945. That was done at the time, was it, Mr. King, that you were revising or rearranging the 3-C type of arrangement that you may have referred to?

A. Yes. That document No. 4-B was part of the 3-C proposition when it was first placed into operation on or about 1945. I believe, as I testified this morning or during the day, this type of contract is only used where the company has some investment in the property, and at that time we thought it advisable to call for the entire requirements as this document provides. But, as I have also testified, at a later date all such contracts in existence except, I think four, were mutually amended to [fol. 2916] require only a minimum quantity or a fixed quantity of gasoline on the basis of the formula that I have heretofore described.

[fols. 2917-2920] Q. The 3-C type of arrangement was one where the operator owns or controls the underlying title to the station, and he leases that to Richfield, and then as a part of the same transaction Richfield at the same time leases it back to the operator-lessor, and enters into this type of sales contract, 4-D, that we have just referred to?

A. Yes, sir.

The Court: If this is a good stopping point, we might adjourn. Is it a good stopping point?

Mr. Dixon: Yes, it is, Judge.

The Court: It is nearly 5:00 o'clock, and I think we will have Mr. King with us. He is not in a hurry to go back to Spokane or Seattle.

The Witness: It is a pleasure to be here, your Honor.

The Court: So we might as well take our adjournment at the present time. All right, Mr. King.

The Witness: Thank you.

The Court: Gentlemen, as I have already informed you, we will adjourn and this case will be continued until Tuesday. We will adjourn until Monday, but the case will be continued until Tuesday morning at 10:00 o'clock. The court will adjourn until the usual time on Monday.

(Whereupon, at 4:55 o'clock p. m., Friday, May 25, 1951, an adjournment was taken until 10:00 o'clock a. m., Tuesday, May 29, 1951.)

[fol. 2921] Tuesday, May 29, 1951. 10:00 A. M.

The Court: All right, gentlemen.

Mr. Dixon: Mr. King, would you resume the stand, please?

William G. King, called as a witness on behalf of the defendant, having been previously sworn, resumed and testified further as follows:

Cross examination (Continued).

By Mr. Dixon:

Q. When we adjourned last Friday, Mr. King, I believe we had started to go into the 3-C type of arrangement. That is one, is it not, where the operator owns or controls the underlying title to the station outlet, and he leases that to Richfield, and as a part of the same transaction Richfield at the same time subleases it back to the operator-lessor, and he enters into a sales contract of the type of Government's Exhibit 4-C at that same time. Now, these leases from the lessor-operator to Richfield and from Rich-

field to the lessor-operator, as lessee, are generally for a long period of time, are they not, Mr. King?

A. Could you change your question to describe these men as dealers, instead of operators? I believe that is the terminology we used all the way through.

[fol. 2922] Q. I would be very glad to take the suggestion, if you would rather call them operators.

A. I would rather call them dealers.

Q. I mean dealers.

A. In answer to your question, the lease between Richfield and the dealer is for a long period, yes; up to 10 years.

Q. In some instances they are for even longer than that period of time, are they not?

A. I know of no instance where we have written any such proposition in excess of 10 years.

Q. Now, I believe at the same time this lease and sublease are entered into, the sales contract is also entered into, as you have described. Now, directing your attention to Government's Exhibit 4-B, which is the operator's sales contract, or the dealer's sales contract, as you call it, that is entered into at this time, and further directing your attention to paragraph 1 thereof, that paragraph requires, does it not, that the dealer or buyer purchase all of his petroleum products that he sells at the outlet leased from Richfield for the period of the lease?

A. Yes, this particular contract required the operator to purchase his entire requirements. However, this particular contract was used prior to 1948, and has not been used since that time.

[fol. 2923] Q. Now, I believe you stated as one of the reasons for this requirement in paragraph 1 the Richfield Company had some investments in the property leased; is that correct?

A. That is generally true with this type of agreement.

Q. What other reason, if any, do you have for the insertion of this paragraph 1 in Government's Exhibit 4-B?

A. I would have no other reason, other than, as I believe I have previously testified, that we felt that in this type of transaction, where competition has forced us to make some investment in the property, that this type of paper was a greater protection to us, to our investment.

Q. And that was in addition to the protective provisions which were contained in the various paragraphs and provisions of the dealer's lease, Government's Exhibit 4-A?

A. Well, I think this agreement is self-explanatory, Mr. Dixon.

Q. Could you state, Mr. King, generally, what the nature of the investment was that Richfield had in these outlets represented by the 3-C type of arrangement?

A. The investment could have been the loan of various pieces of equipment, pumps, tanks, hoists, compressors, any of the usual equipment that goes into the operation of the station. It could have included additions and improvements to the property, to the structures. It might have included an outright loan to the dealer of cash.

[fol. 2924] Q. And it is a fact, is it not, Mr. King, that on the termination of the lease from the operator to Richfield, Government's Exhibit 4, that any improvements of the type that you have described in the nature of buildings which Richfield might place upon the property leased to Richfield and subleased back to the dealer can be removed, is it not?

Mr. Paradise: I think if counsel is asking for the interpretation of an agreement he should call the witness' attention to the particular paragraph he has in mind, if he is permitted to ask it at all. I have no objection, but I think in fairness to the witness that should be done.

The Court: If the witness cannot answer in that manner, I will have the question reframed. He seems to be able to answer these questions and I do not anticipate any exception as to this one. You can answer that question, Mr. King, the way it is worded?

The Witness: Your Honor, I would like to have the question read.

The Court: All right.

The Witness: Would you read it, please?

(Question read by the reporter.)

A. I would like to point out in answer to your question that where the improvements are of a permanent nature affixed to the property, such as a structural improvement, why, we could not and would not remove them. Now, our

agreements sometimes provide that the additional equip-
[fol. 2925] ment or that the equipment that we furnish under this contract will become the property of the dealer on the expiration of the contract, and in other cases the equipment is removable by Richfield upon termination of the contract.

By Mr. Dixon:

Q. Directing your attention to paragraph 5 of Government's Exhibit 4, it is the policy, is it not, of Richfield to either remove any buildings or other improvements that it may have placed upon the premises described in the lease at the termination of the lease, or to sell them to the dealer-lessee?

A. No. It all depends upon the terms of the agreement as entered into. In some instances we have made these improvements which will be self-amortized over the term of the contract, and in other cases, as I have pointed out, the equipment may be freely removable by Richfield at the end of the contract. It all depends what the basis of the original agreement with the dealer.

Q. So that the type of equipment and property that you have described is what you have been referring to as the Richfield investment made under the 3-C arrangement, is that correct?

A. That would be part of it. That would be part of the investment, yes, sir.

Q. Does Richfield ever operate or take actual possession
[fol. 2926] of the property leased under the form Government's Exhibit 4?

A. Richfield has never, to my knowledge, taken over the operation of any station which was contracted under our 3-C proposition.

Q. So that actually there is never any change of possession of the premises which may be leased under Government's Exhibits 4 or 4-A from the dealer to Richfield and from Richfield back to the dealer, is there, Mr. King?

A. The original dealer, the lessor, could sell his property and——

Q. If I may interrupt? I mean at the time that the leases are entered into, Government's Exhibits 4 and 4-A?

The Witness: Read the question, please.

(Question read by the reporter.)

A. That is right.

Q. Directing your attention to paragraph 3 of Government's Exhibit 4-A, the language: "That the lessee shall make no change, alteration or substitution in the demised premises, improvements, buildings, fixtures and equipment, except such as may be necessary to enable lessee to continue business on said premises, unless the consent in writing of lessor be first obtained," would you state to the court what the purpose of that particular provision is?

Mr. Paradise: Well, now——

By Mr. Dixon:

Q. If you know?

[fol. 2927] Mr. Paradise: My objection relates to the confusion in point of time. The question as framed is "what is the purpose," what presently is the purpose of this provision.

Mr. Dixon: I did not ask that, counsel.

Mr. Paradise: What?

Mr. Dixon: I did not ask that, counsel. I asked this witness, as I have been asking him other questions, what the purpose of that provision is, if he knows.

Mr. Paradise: Well, that is what I say. The objection relates to the question of point of time. Your question relates to the present time.

The Court: All right. Read the question, please.

(Record read by the reporter.)

The Court: The last question is the only question pending. Go ahead.

Mr. Dixon: Can you answer that?

A. I do not know, Mr. Dixon.

Q. Handing you Government's Exhibit 4 and directing your attention to paragraph 4 therein, I direct your attention to the words "automobile accessories." I will ask you, Mr. King, if that provision was first inserted in the

lease from the dealer to Richfield under the 3-C type of arrangement at that time, namely, in November 1945?

A. Well, this paragraph 4 that you refer to appears in the Form 362 as of print date of 11-45, or your Exhibit No. 4.

[fol. 2928] Q. And any reference to the use of the property leased by the lessor to Richfield for carrying on the business of selling automotive accessories was not contained in that form of lease from the dealer to Richfield prior to that time, was it?

Mr. DeMartini: I submit that assumes something not in evidence, or contrary to the evidence, because I believe this is the first print of this instrument.

Mr. Dixon: I think my question is clear.

The Court: All right.

By Mr. Dixon:

Q. If you know Mr. King?

A. Yes. Just a minute, please. Will you read that question?

(The question was read.)

A. Well, prior to this time, Mr. Dixon, I don't know of any earlier printing of this particular form, or this particular contract. In other words, I think this document speaks for itself. It was in use in 1945, but it is no longer in use.

Q. That form of lease is still in use, is it not, Mr. King, and has been in use since November, 1945?

A. That is the earliest time that it was used.

Q. Yes.

A. I believe that the lease—I would like to examine a later lease, to see if that provision, or that paragraph, has [fol. 2929] not been altered.

Q. My original question, Mr. King, was whether you knew whether that provision that I have referred to was contained in any other prior forms of leases from the dealer to Richfield under the 3-C or 2-B type of arrangement.

A. Well, I have no knowledge other than this particular agreement in front of me now, the 2-B arrangement has

been long since discarded, and I just don't recall what was in that.

Q. Can you state to the court what the purpose of that particular reference to the use of the property for the business of selling automotive accessories was?

A. I think it was the intent of that paragraph to limit the use of this property to that of an automobile service station.

Q. And to provide also that automotive accessories would be sold on the premises leased; isn't that a fact, Mr. King?

A. Well, that would naturally go along with the operation of the property as an automobile service station, but does not necessarily imply that it would control the sale of Richfield's automotive accessories.

Q. That provision was inserted in this form at about the same time as Richfield was instituting or embarking on an intensive TBA sales program, was it not?

[fol. 2930] A. Well, Richfield had embarked on its TBA sales program long before this time, Mr. Dixon.

Q. I am speaking now about the end of 1945, when this form first appeared in this type of lease.

A. Well, we were developing the sale of automotive accessories at that time, if that answers your question.

Q. Now, I believe you testified that the exclusive requirements provision relating to petroleum products, as set forth in Government's Exhibit 4-B, was eliminated from the sales contract, 4-C, which was the type of sales contract used in connection with the 3-C arrangement in August of 1948, is that correct?

A. Yes, sir.

Q. And at that time you issued instructions to all of your members of your organization who were in contact with the dealers under the 3-C arrangement to change the dealer to a new type of contract, namely, Exhibit 4-C; is that correct?

A. Yes, sir.

Q. Now, did you give any written instructions to your staff under your supervision concerning the manner and method of effecting that change?

A. I do not recall just how the instructions were given,

either in writing or orally, but they were conveyed to the organization as to the manner in which we desired to amend [fol. 2931] the existing 3-C proposition with our dealers.

Q. Do you know as a *a* fact whether any written instructions were given and circularized among your staff, who were to contact the 3-C dealers with whom contracts of the type 4-B were then in effect?

A. I do not recall the exact manner in which the instructions were issued.

Q. It is a fact, is it not, Mr. King, that regardless of the provisions in contracts of the type, 4-B and 4-C, relating to the purchase of petroleum products from Richfield, that the dealer or purchaser of those products from Richfield purchased in fact his entire requirements of gasoline and petroleum products while those contracts were in effect, did he not?

A. Generally speaking, the dealers under the 3-C proposition have purchased their entire requirements of gasoline, even though they are under no obligation to do so under the terms of that contract.

Q. And you know of no instance, to your knowledge, where they did not do so, do you?

A. I know of instances where they have abrogated the contract.

Q. My question, Mr. King, relates to the purchases made as long as the sales contract was in effect between Richfield and the dealer.

[fol. 2932] A. I do not know of any instances where they have purchased another supplier's gasoline while the contract was in effect. As I have pointed out, there are numerous instances, though, where they have entirely abrogated the contract.

Q. Now, it is a fact, is it not, Mr. King, that your salesmen made visits at least once a week to the dealers under the 3-C type of arrangement?

A. Our salesmen have no set schedule, but I would say that, generally speaking, they call on these dealers possibly three or four times a month, all in the interests of retaining their good will.

Q. It is a fact, is it not, that one of the purposes of those

weekly visits is to have the salesmen visit the station and survey the products being handled at the station?

A. No, that is not the purpose of the salesman's visit.

Q. Is that one of the purposes of the visit?

A. Well, you must understand what a salesman's duties are. He is out—he is charged with the responsibility of selling the company's products.

[fol. 2933] Q. I understand that, Mr. King.

A. And it would be only natural that if he finds that the dealer is buying competitive products, he is going to endeavor to sell them on the merits of our products. But in answer to your question, it is quite possible in calling on the account he is going to take stock of what the competitors are able to sell him and endeavor to displace those products, if he can, through interesting him in the merits of our products.

Q. And, as I believe you call it, to concentrate on the handling 100 per cent of Richfield's products by such dealers?

A. Well, we would be delighted if the dealer would see fit to handle our products entirely. Naturally, that is the objective of our salesmen from the sales standpoint, but certainly it is entirely up to the dealer to do so. In other words, the dealer, he is the last word in that respect as to whether or not he is going to buy our products or somebody else's products.

Q. Now, directing your attention to the 337 type of arrangement, that is the one, is it not, where the dealer enters into a sales contract and usually enters into a painting agreement?

A. Well, as I have testified before, he may or may not enter into the paint agreement concurrently with the [fol. 2934] writing or entering into a 337 contract.

Q. Directing your attention to Government's Exhibits 5-C and 5-E, I will further direct your attention to paragraph 1 of Government's 5-C and ask you what the purpose of that provision was, if you know?

A. I believe I have previously answered you, Mr. Dixon, that I do not know the purpose of that provision.

Q. Now, comparing paragraph 1 of Government's Exhibit 5-C with paragraph 1 of Government's Exhibit 5-E

there is a difference between the two paragraphs, is there not?

A. Yes, sir.

Q. And what is that difference as you compare them?

Mr. Paradise: Do you want him to read it into the record?

A. Well, the paragraph 1—you are asking me to explain that?

Mr. Dixon: Yes.

A. Paragraph 1 in Exhibit 5-C requires the dealer to remove from the surface of the station to be painted all signs and insignia, and upon completion of the painting of the station by Richfield shall not place upon or over the painted surfaces any advertising sign, trade-mark, insignia, or any other matter without first securing the consent and approval of Richfield.

In paragraph 1 of Exhibit 5-E it simply provides that the dealer shall remove from the surface of the station [fol. 2935] which is to be painted all signs, insignia and obstructions so that the obligations of Richfield hereunder may be performed with a minimum of hindrance.

Q. Exhibit 5-E, I believe, was adopted in August of 1948, was it, Mr. King?

A. Yes, sir.

Q. As you have stated the previous provision with reference to the dealer putting signs on his property without the approval of Richfield, as set forth in paragraph 1 of Government's Exhibit 5-C, was removed or at least does not appear in paragraph 1 of 5-E?

Mr. Paradise: I submit that that is a distortion of the witness' testimony. He did not say anything about removing signs from the property. He talked about from the painted surfaces of the building.

Mr. Dixon: My question, counsel, was a question. I did not say the witness accepted anything, if you read my question.

The Court: Go ahead, you may answer.

The Witness: Read the question, please.

(Question read by the reporter.)

A. The paragraph 1 of 5-C referred to only removal of signs on that part of the service station which was to be

painted. It does not refer to signs that might be placed anywhere else on the property.

[fol. 2936] Q. You have just referred to 5-E, Mr. King?

A. I am referring to the original, or the provision in paragraph 1 in 5-C.

Q. All right.

A. Which called for the removal of signs or the restriction upon replacing signs upon the structure that was actually painted by Richfield. It does not prohibit the——

Q. Without first procuring the consent and approval of Richfield?

A. Yes, upon the area that was painted by Richfield. It did not prohibit the dealer from putting up signs anywhere else.

Q. Now, that provision does not, as you have indicated, appear in paragraph 1 of 5-E?

A. No.

Q. Now, can you state to the court what the reason was, if you know, for that change or elimination?

A. I do not know the reason for it, for the change.

Q. Did you give any instructions to your salesmen who were negotiating 3-C deals with reference to the change in this provision of paragraph 5-E as against the provision which previously appeared in paragraph 5-C?

A. Well, no instructions were necessary. The document speaks for itself as far as our representatives are concerned. And in the next place, the painting agreement [fol. 2937] that we refer to here, 5-C and 5-E, is not used, Mr. Dixon, in connection with the 3-C proposition.

Q. Just what is 5-C used with, Mr. King?

A. 5-C when in use or when in effect——

Q. I beg your pardon. Did you say 5-C was not used in connection with the painting or 3-C deal?

A. Yes, sir.

Q. Yes, I understand that. That was under the 2-B deal.

A. Well, that is quite possibly so.

Q. And the Government's 5-C was not used after 5-E was. That is a fact, is it not?

A. That is right. 5-E——

Q. So it was—pardon me.

A. 5-E superseded it.

Q. But prior to the use of 5-E, 5-C was used when there was any painting of any station to be done, was it not, Mr. King?

A. Under the Form 337 contract. Your question referred to its use in connection with the 3-C proposition.

Q. I am sorry. I am glad you corrected me. We are talking about the 337 type of arrangement.

The Court: We are getting all mixed up on the alphabetical terminology.

Mr. Dixon: I believe the record is now clear, your Honor.

[fol. 2938] The Court: Well, let us not argue about it. It is evident there is some confusion here. If you want to straighten it out, all right. I will give you ample opportunity to argue the variations, etc., at the proper time.

By Mr. Dixon:

Q. Mr. King, I believe you testified that Richfield——

The Court: There is one question occurred to me at the time you asked him. It slipped my mind.

Mr. Dixon: Pardon me, your Honor. Go ahead.

The Court: There was read to you the portion of the contract which has been providing for signs. It used the language "in order to prevent". What was the wording that was used? In order not to interfere with the performance of the contract. Do you remember that clause which forbids signs? You were reading from the contract.

The Witness: Yes, sir.

The Court: And that is the reason it is given. To what does that refer? What portion of the contract does it refer to?

A. I was reading from—in both instances I was reading a paragraph from the two different forms of painting agreement that we have used.

The Court: Yes. But what performance does it speak of? Does it relate only to performance of products, the use of petroleum products?

[fol. 2939] The Witness: No.

The Court: Or does it relate to others? What does it refer to?

The Witness: In the Exhibit 5-C it provides that the

dealer shall remove from the surface of the station which is to be painted all insignia and other signs, and shall not place back upon the painted surfaces any advertising signs, trade-marks, etc., without first procuring the consent and approval of Richfield.

The Court: Well, that refers, of course, to signs advertising anything, not only petroleum products.

The Witness: Oh, yes. It may be Coca Cola, Pepsi Cola, tobacco or anything.

The Court: That is right. And then there is another clause I thought you read that followed that. What did it say? In order to—did you insert that?

The Witness: No. The next clause that I read, sir, was in Exhibit 5-E, and that is the latest agreement and the one now in use. It says: The dealer shall remove from the surfaces of the service station which is to be painted—from the surface of the service station which is to be painted.

The Court: That is right. I understand that.

The Witness: All signs, insignia and obstructions so that the obligations of Richfield hereunder—that is the obligation to paint the station—may be performed with a minimum of hindrance.

[fol. 2940] The Court: Oh, I see. That is my error. I thought that the qualifying clause referred to the obligation of the dealer, instead of the obligation of Richfield. That is my error. Go ahead.

By Mr. Dixon:

Q. Directing your attention to Government's Exhibit 5-G, Mr. King, paragraph 1 thereof, I believe you testified that the minimum amount specified in paragraph 1 of Exhibit 5-D was determined by your estimating at least 75 per cent of the gallonage requirements of that station; is that correct?

A. That is not exactly correct, Mr. Dixon. It was not an estimate of the gallonage. Our representatives were instructed to insert in there, in the minimum a figure which represented originally 85 per cent and at a later date 75 per cent of the dealer's known past sales. It was only estimated in the event it was a brand new station with no previous sales experience.

Q. Thank you. Now, when was the figure reduced from 85 per cent to 75 per cent for contracts such as Exhibit 5-D?

A. The percentage figure of 85 per cent was reduced to 75 per cent in the early part of 1950.

Q. What was the reason for that reduction, Mr. King?

A. I issued those instructions to our organization upon the advice of our legal department.

Q. It is a fact, is it not, Mr. King, that regardless [fol. 2941] of the provisions of paragraph 1 of Exhibit 5-D and of paragraph 1 of Exhibit 5-G, that the dealer or purchaser of your petroleum products, of gasoline, did in fact, while contracts of that type were in effect between the dealer and Richfield purchase his entire requirements of gasoline from Richfield?

A. It has been our experience that while these contracts have been in effect that the dealer has purchased his entire requirements, though there are numerous instances where he has canceled the agreement or otherwise abrogated it by ceasing the purchase entirely of our products.

Q. My question, of course, related only to the purchases made while the contract was in effect.

A. I believe I answered that, Mr. Dixon.

Q. Very well. Now, I believe you also testified——

The Court: Well, a penalty attaches to that. If he doesn't do that, then he is obligated to pay for the cost of the painting?

The Witness: No, your Honor, that is not correct. In the first place, he has, on the one hand, this sales contract, in which he has agreed to purchase a specified quantity of gasoline.

The Court: That is right.

The Witness: Then in addition, on the other hand, if he has desired to have the station painted, we have painted the [fol. 2942] station and he has signed a paint contract.

The Court: That is right.

The Witness: And as long as he continues to purchase the quantity of gasoline as specified in the sales contract, even though he sold other gasoline, we would have no right to effect collection under the paint contract.

The Court: I see.

The Witness: The only time we have ever effected col-

lection under the paint contract is where he has stopped buying entirely, and we are out of the station.

The Court: I am glad you set me right on that.

By Mr. Dixon:

Q. But while he is buying any gasoline from Richfield, he is buying his entire requirements, is he not, Mr. King, under the forms of sales contracts, Government's 5-D and 5-G.

Mr. Paradise: I object to the form of the question as argumentative, and an interpretation of the contract. I have no objection to a question concerning practices.

The Court: Overruled.

The Witness: As I have testified, Mr. Dixon, it is my knowledge that so long as these contracts are operating with the dealer that he has bought—it has been our experience he buys his entire requirements from us, though we have numerous experiences where he abrogates the contract.

The Court: The sales contract is gauged to the maximum [fol. 2943] that he can use, is it not?

The Witness: No. You see, your Honor, he is only obligated to buy under this contract a quantity not to exceed 75 per cent of his known past sales.

The Court: All right.

By Mr. Dixon:

Q. I believe you testified, Mr. King, that with reference to TBA products, Richfield does sell some such products direct to dealers.

A. Yes. I believe I have testified, Mr. Dixon, in about 25 instances do we make direct sales to dealers.

Q. Are those instances of L-O dealers or operators only?

A. No. I believe that the instances I speak of will include both—may include both L-O operators, 3-C's and 337's.

Q. What is the basis of your determination of making such direct sales to such dealers?

A. I have previously testified that our reason for making a direct sale to the dealer is where we encounter an in-

stance where the dealer is such a large seller of TBA items that competition would extend to him as good a price as would be enjoyed by our own TBA distributors.

I would like to correct my previous testimony, to strike out the L-O operators. Our deals, I am positive, are all confined to 3-C's or 337's.

[fol. 2944] Q. What quantity of purchases does such a dealer have to make before he is entitled to this additional discount, as you would call it, or a discount?

A. Well, as you may know, in the automotive accessories business, including tires and batteries, dealers receive certain discounts for their volume sales and the minimum amount that is delivered. I am not too familiar with that practice, but where a dealer has a known volume of business, competition—I am speaking now of the vendors of automotive accessories, and tires, and batteries—will give that dealer a proposition in keeping with the volume of his sales. Therefore, when we encounter that situation, if we desire to do business with that dealer, why, we would have to be competitive with the general practice in the automotive industry.

Q. I understand that, Mr. King, but I would like to know what tests you apply as a matter of policy, on the part of Richfield, as to when you decide that a dealer is eligible for that discount. Do you understand my question, Mr. King?

A. I think I do. I think that would arise under these circumstances: The account, or the dealer, we would like to have him buy at least a representative line of our TBA products, so that they could be sold to our credit card customers. He might, in turn, notify the TBA distributors in that area that there was no use in his calling on him, because he could secure so-called distributors' prices from any [fol. 2945] one of a half a dozen manufacturers of TBA items. That would make known to us that he has a volume of business that would entitle him to, we will say, the wholesale or distributor's margin. In those instances that would probably decide us whether or not to offer a direct TBA distributorship to that dealer.

Q. Does the particular dealer to whom you make these direct sales have to purchase a stipulated amount of TBA

products from Richfield before he becomes eligible for this discount that is not given to the other dealers?

A. It is the general practice in the tire business, for example, to set up——

Q. I don't mean to interrupt, Mr. King,——

A. Yes.

Q. —but could you answer that particular question "Yes" or "No"?

A. Read the question, please.

(The question was read.)

A. Yes.

Q. What is that amount, Mr. King?

A. Those amounts are established by competition in the tire, tube and battery——

Q. I am talking about the amount so far as Richfield is concerned, that the dealer must buy before he is eligible for this discount.

[fol. 2946] A. I am not familiar with the exact amounts. I can't answer that question.

Q. Did I understand your answer to my previous question to be that there was a stipulated amount that he had to purchase before he became eligible for the privilege of buying direct from Richfield?

A. Yes. The discounts are based upon his annual purchases and the quantities that are delivered at any one time, which is common practice in the automotive accessory business.

Q. I am not asking what the common practice is, Mr. King. I would like to know, if you can answer, what the amount is that Richfield has decided the dealer must buy dollarwise before he becomes eligible for the privilege of purchasing direct from Richfield? In other words, is it $10,000 a year, or $5,000, or what is it?

A. Well, I believe I answered that question before, Mr. Dixon, that there are certain practices in the sale of these automotive accessories, and if the dealer says he qualifies or that he has a certain volume of business which would entitle him to certain discounts which would be extended by any vendor of TBA, why, that would be one of the determining factors in extending the proposition to him, but

he would not earn those discounts unless he actually sold the volume that he claimed that he had heretofore.

Q. Then it isn't a matter of Richfield having a particular [fol. 2947] amount that the dealer must buy from Richfield, or buy, before he gets the discount; is that a fact, Mr. King? Do you understand the question?

A. Well, I will ask the question to be read, please.

(The question was read.)

A. Well, if I understand your question correctly, the discounts that a distributor of automobile accessories enjoys vary with the volume of his purchases.

Q. You are speaking now of the Richfield dealer that you give this discount to, Mr. King? That is all we are interested in. I am trying to get an answer as to the amount dollarwise that a dealer must purchase in tires, batteries and accessories before he becomes eligible to get this additional discount that he gets by direct purchases from Richfield.

A. And I am trying to answer your question, and explain to you, Mr. Dixon, that in conformance with the practice in the trade, his discounts are determined by the volume of his purchases. One discount might apply to $10,000, and another discount to $20,000.

The Court: Then there is no precise amount that determines the discount, or is it variable as to the value? That is what he is trying to find out.

The Witness: Yes, and I am trying to give an intelligent answer, your Honor. I am trying to explain that the deal- [fol. 2948] er's discounts or distributor's discounts on tires, for example, will vary with the amount of his annual purchases.

The Court: All right. When do they start? At what amount of sales do they start?

The Witness: These discounts are not payable until at the end of stipulated periods of time. If he has not sold the merchandise, then he does not earn the discount.

The Court: Then what volume in dollars does he have to buy before he earns it at all?

The Witness: I do not know the discount that applies to the minimum amount, your Honor. I do not recall it.

We will assume for the moment that it might be 5,000, and then he would get one discount for that volume, and he might get another discount for 10,000.

The Court: All right.

By Mr. Dixon:

Q. Then, I take it from your testimony or your answer, Mr. King, that there isn't any particular amount dollarwise of the total purchases of TBA products that a dealer must buy before he is entitled to this discount, which he gets from making direct purchases from Richfield; is that a fact?

A. Read the question, please.

(The question was read.)

A. Well, he is not given—he is not entitled to any discount until he actually produces a certain volume of sales, [fol. 2949] or makes a certain volume of purchases.

Q. What is that volume, Mr. King? That is what I am trying to find out.

A. I have told you, Mr. Dixon, that I am not familiar with the volumes that apply to the sales of TBA. I do not know it. It is a detail I am not familiar with. I have just tried to explain to you generally how it works.

The Court: Then put it the other way: Then, as a matter of fact, he gets a discount on everything, the amount only depending upon quantity, is that correct? Or is that incorrect?

The Witness: That is correct, your Honor.

The Court: That is correct. All right. This is a good stopping point. I got something out of the way.

(A short recess was taken.)

[fol. 2950] By Mr. Dixon:

Q. I believe you testified, Mr. King, that these discounts that you referred to are available only to the 3-C and the 337 dealers?

A. Which discounts, Mr. Dixon?

Q. The dealers who buy direct from Richfield as distinguished from those who buy through the distributor or common distributor the TBA products sponsored by Richfield are 3-C or 337 dealers, are they not?

A. Yes. I believe I testified that there might be some L-O operators included in that.

Q. And those are the ones who get whatever advantages, if any, there may be from this discount by purchasing directly from Richfield. I will direct your attention to Government's Exhibit 8. Did you have any discussion with Mr. Dinkins about any of the matters referred to in Government's Exhibit 8, Mr. King, prior to its being written by Mr. Dinkins?

A. I would like to read the letter, Mr. Dixon. I am not familiar with it.

Q. Certainly. I want you to.

A. Yes. What is your question, Mr. Dixon?

Q. I am sorry.

A. What was your question, sir?

Mr. Dixon: Read the question, Mr. Reporter, please.

(Question read by the reporter.)

A. I don't recall I had any conversation prior to its [fol. 2951] being written, but naturally the subject content was undoubtedly discussed.

Q. It is a fact, is it not, Mr. King, that the TBA program referred to in Mr. Dinkins' memoranda, Government's Exhibit 8, related to the entire TBA program of Richfield, did it not?

A. Yes, it related to our TBA program. The whole letter is—the entire contents of the letter is on that subject.

Q. And that in this memoranda, Government's Exhibit 8, as far as you know, Mr. Dinkins was referring to all of the dealers of Richfield?

A. From reading this letter I would say that he was referring particularly to the lack of interest that our commission agents had displayed in acting as a TBA distributor, and in particular, lack of interest that had been displayed in instructing our L-O operators to handle our approved line of TBA.

Q. Did you have any conversation with Mr. Dinkins about this matter of TBA program as outlined in Government's Exhibit 8 after that memoranda was sent to the persons named therein?

A. I don't recall any specific discussion or any certain

discussion, Mr. Dixon. It is a matter of routine business that we undoubtedly discussed on many occasions.

Q. But, to the best of your recollection, the matters re- [fol. 2952] ferred to in Government's Exhibit 8 related to all of the Richfield dealers, did it not, L-O or 3-C or 337?

A. Well, naturally, this letter, the contents of this letter refer primarily to our commission agents and our L-O operators.

Q. May I interrupt there?

A. And our L-O operators, naturally, we were also interested at that time and are interested today in securing the agreement of our dealers to stock TBA so that they can give the service to our credit card customers that I have previously testified to that we would like to do.

Q. I will ask you to refer to Exhibit 8 and state, if you will, whether there is any specific reference anywhere therein to the L-O operators or dealers as such?

A. Yes.

The Court: Well, go ahead. Go ahead, read it.

A. It says:

> "Our TBA activity in 1946 yielded a profit to Richfield of $471,000, an increase of 43.5% over the profit for 1945. This means that every month that went over our heads each controlling L-O unit produced an average *Per Unit, Per Month,* of better than $35.00 which, reduced to terms of resale gallons, means ⅓ cent per controlled resale gallon added profit to the corporation through our TBA activity."

[fol. 2953] He refers entirely to the sale of TBA through L-O stations there, and then he goes on to refer to the fact that we are embarking upon the construction of new service stations.

The Court: All right.

By Mr. Dixon:

Q. So that, then, this memoranda does not apply to all of the Richfield dealers or all of the purchasers of the TBA products sponsored by Richfield, is that your statement now, Mr. King?

A. Every reference in here is either to L-O stations or to our merchandising organization. All the names of individuals that he mentions in here, Mr. Burgner and others who are the division merchandising managers, have nothing to do with the solicitation of business from the dealer stations. So the whole contents of the entire letter, Mr. Dixon, are devoted to the development of more TBA business on the part of our L-O stations.

Q. I asked you the question: Do you now wish to change your testimony, Mr. King, to the effect that you have just mentioned?

Mr. Paradise: I submit that that is unfair.

The Court: No, no. He has stated generally it referred to TBA generally, but the special emphasis was on what was being done at the L-O stations. Isn't that true?

The Witness: I think you have expressed it very well. It talks about TBA, but the principal and general emphasis [fol. 2954] is certainly upon the sale of TBA through L-O stations.

The Court: Very well, let it stand at that.

Mr. Dixon: I believe the witness cleared it up, your Honor. The Government asks that these be marked as Government's Exhibits next in order.

The Clerk: Government's Exhibit 28 marked for identification.

Mr. Dixon: And 28-A.

The Clerk: Government's Exhibit 28-A marked for identification.

Mr. Dixon: We will ask that this be marked for identification as Government's Exhibit 29.

The Clerk: So marked.

(The documents referred to were marked Plaintiff's Exhibits 28, 28-A and 29 for identification.)

Mr. Dixon: The Government offers into evidence Exhibits 28, 28-A, and 29.

The Court: They may be received.

Mr. Dixon: Your witness.

(The documents referred to were marked Plaintiff's Exhibit 28, 28-A and 29 and received in evidence.)

The Court: Redirect. Let me see the exhibits.

Mr. Paradise: Have you finished, Mr. Dixon?

The Court: Yes, he has finished.

Mr. Paradise: Oh, I am sorry. I did not hear you.

[fol. 2955] The Court: Does the record show—at least I did not hear it—on this debit memorandum which is marked Exhibit 29—it is quite evident that this is a carbon copy—but there is a notation of giving a good mark to the man involved in authorizing the discount. I wonder if you could tell us who wrote that? It reads as though it was written by your local merchandiser or somebody, because of the wording of it.

The Witness: I have not seen it, your Honor.

The Court: You take a look at it and tell me.

The Witness: Thank you.

The Court: I so interpret it. In other words, the local man says: Here is a good guy. Give him a little discount which will help him out. Can you tell?

[fol. 2956] The Witness: Your Honor, this refers to an operator of one of Richfield's leased out stations at Salinas. The conditions and circumstances surrounding this are as follows: Due to the fact that our wholesale TBA distributor in that area was changed, and due to the fact that there was that change three times during the year, that is, the wholesale TBA distributor in that area was changed, it is evident that a dispute arose with this particular dealer, who claimed that he was not in a position then to receive the volume discounts that he was entitled to as a result of his purchases of tires and tubes over the period of a year's time, because of the aforementioned change in the wholesale TBA distributorship, who would normally pass that discount on to him. Therefore, to retain the good will of this L-O operator, who had this volume discount coming to him, our representative recommended that the discount be paid to him by the company, inasmuch as the previous TBA distributors were not available and were not in a position to pay that discount.

The Court: All right. Go ahead.

Redirect examination.

By Mr. Paradise:

Q. Mr. King, just to clarify one matter for the record, you testified, and I think this appears on page 1749 of the record, that the average gallonage of L-O stations at the [fol. 2957] end of the last war was, I believe you said, 6700 to 6800 gallons. Then you also testified what the average gallonage of the L-O stations was at the end of 1950. I don't think you mentioned to what period you were referring.

A. I was referring to a monthly average.

Q. That is per month?

A. Per month.

Q. Now, in answer to Mr. Dixon's question, you stated that in some circumstances Richfield gives a discount to 337 or 3-C dealers, and that that takes the form of a letter or an addition to the printed form which is given to the dealer at the time the contract is signed; is that correct?

A. Yes, sir.

Mr. Paradise: Will you mark these for identification, please?

The Clerk: Defendant's Exhibit R, marked for identification.

(The letters referred to were marked Defendant's Exhibit R, for identification.)

By Mr. Paradise:

Q. Mr. King, I show you two mimeographed forms on the letterhead of Richfield Oil Corporation, which have been marked Defendant's Exhibit R, for identification, and ask you whether those are the letters that you have referred to covering these discounts.

A. Well, there are two forms here. One refers to, or, [fol. 2958] one is a subsidy letter to L-O operators.

Q. No, this is the 3-C (indicating).

A. Oh, one is the discount letter or extra margin letter, as we call it, to 3-C dealers, and the other is the extra margin letter to dealers contracted under Form 337.

Q. The instrument that refers in the first line to your sales contract, Form 783, that refers to the 3-C transactions, does it not?

A. Yes, sir.

Q. Just for identification, that is the form that is used with the 3-C dealers?

A. Yes, sir.

Q. And the other letter which constitutes this exhibit refers to Form 337 dealers, does it not?

A. Yes, sir.

Q. Now, is this letter what you have referred to as the extra margin letter?

A. That is correct.

Q. Under what circumstances are these extra margin letters used with the 337 and the 3-C dealers?

A. In the course of our solicitation of business of independent dealers, where we endeavor to contract for a specified portion of their gasoline under either the 337 contract or the 3-C contract, we frequently encounter the offers made by our competitors, in other words, offers made by other [fol. 2959] supplying oil companies. These offers consist of stipulated discounts from the posted tank-wagon or wholesale prices. If we are to be successful in the solicitation or the acquisition of that dealer's business, then it necessarily follows that we must meet the competitive offers made for that dealer's business by other oil companies. Therefore, concurrently with the execution of either the 337 or the 3-C proposition, we execute one or the other of these margin letters, which agrees or by which we convey to that dealer the extra discount that we were compelled to extend in order to acquire his business.

Q. Now, is that extra margin letter ever given to L-O operators?

A. No, the extra margin letter is never given to L-O operators.

Q. Why not?

A. Well, there is no need to. We are not competing with any other oil company for the business of the L-O operator.

Mr. Dixon: I object to that, your Honor.

The Court: That is all right. Go ahead.

By Mr. Paradise:

Q. You have mentioned that you have given something that you called a subsidy to L-O operators, have you not?

A. Yes, we have a subsidy letter for L-O operators.

[fol. 2960] Mr. Paradise: Just one moment.

The Court: Have these margin letters been introduced?

Mr. Paradise: No. Thank you, your Honor. May I offer in evidence as Defendant's Exhibit R the extra margin letters?

The Court: Yes. All right.

The Clerk: Exhibit R in evidence.

(The letters, heretofore marked Defendant's Exhibit R, for identification, were received in evidence.)

By Mr. Paradise:

Q. Calling your attention to Defendant's Exhibit F, is this what you refer to as the subsidy letter given to L-O operators?

A. Yes, this is the subsidy letter that we use in connection with L-O operators.

Q. Under what circumstances is that letter issued to L-O operators under Richfield's practice?

A. During gasoline price wars our L-O operators are faced with lower prices, as posted or displayed or advertised on gasoline by other service station dealers in their vicinity.

Q. This is the matter you have already testified to, and it relates to gasoline price wars; is that correct?

A. It relates to gasoline price wars.

Q. Thank you. Now, Mr. King, Mr. Dixon asked you concerning the change made in the 3-C sales contract, which is Form 783, comparing Government's Exhibit 4-B and 4-C, insofar as it relates to paragraph 1 concerning the [fol. 2961] quantities. Exhibit 4-C, by way of identification, is the form that was printed in the fall of 1948. Mr. Dixon also asked you whether after the form was changed the dealers continued to purchase all of their requirements of gasoline from Richfield during the time the contracts were in effect. To your knowledge, Mr. King, do the 3-C dealers presently, or at any time since

1948, purchase and handle exclusively Richfield oils or greases?

A. That would be a rare instance. I know of no instance —I have no knowledge of any 3-C dealer or 337 dealer handling all of our products exclusively.

Q. Now, you are talking about lubricating oils and greases?

A. I am talking about lubricating oils and greases.

Q. Now, directing your attention to gasoline, what is your knowledge with respect to the purchasing practices of the 3-C dealer on gasoline, subsequent to 1948, under this form of contract?

A. As testified this morning, it has been our experience that the 3-C dealers and the 337 dealers have purchased all of their requirements of gasoline from us, except in those cases where they have broken their contracts and discontinued all purchases.

Q. Now, what to your knowledge have been the buying [fol. 2962] practices of 3-C dealers with respect to the purchase, handling and stocking of approved TBA? And by "approved TBA," I am referring to TBA approved by Richfield for credit card purposes.

[fol. 2963] A. Well, I would say that the average 3-C dealer, upon inspection or upon investigation, it would be determined that he does not handle even our entire line of approved TBA items, and that he will be handling many items competitive with our approved list.

Q. In what manner do you familiarize yourself with the purchasing habits of the 3-C and 337 dealers?

A. Well, by frequent trips all through our operating territory in company with our marketing personnel. I come in contact with hundreds of dealers throughout the year.

Q. During those trips do you visit the stations not only of the 3-C and 337 dealers but also the L-O operators?

A. I try to visit all of our accounts. I try to visit as many as I can.

Q. And based upon that observation would you state the extent to which you have ascertained whether 3-C dealers display competitive lubricating oil signs?

A. I think that, generally speaking, our 3-C dealers not alone are selling competitive motor oils but also are dis-

playing the advertising signs of the suppliers of those oils.

Q. What about signs pertaining to competitive batteries and TBA?

A. I think that that will be—I think that my same answer will apply to those products.

[fol. 2964] Q. Mr. Dixon also asked you concerning the buying practices of the 337 dealers under the Government's Exhibit 5-D, which is the 337 sales contract. Will you state what your experience and observation has been with respect to the buying habits of those dealers since 1948, or before 1948 if you like.

A. Well, with respect to the 337 dealers I would say that, generally speaking, you will find that they are handling competitive oils, greases and TBA items, and displaying advertising signs advertising that fact.

Q. In your opinion what percentage of them are so doing?

Mr. Dixon: I object to that question, your Honor, what percentages.

Mr. Paradise: It is a matter of his observation, Mr. Dixon.

Mr. Dixon: I know.

The Court: Overruled. Go ahead.

A. It is my opinion that at least the majority of dealers fall into the category that I have told you about. I would say 75 per cent.

By Mr. Paradise:

Q. Does that apply equally to TBA as to lubricating oils and greases?

A. I have so testified.

Q. In response to Mr. Dixon's question as to your instruc-[fol. 2965] tions in 1948 as to the manner of determination of quantities to be used in a 337 sales contract, which is Government's Exhibit 5-D and reprint in August 1948, I believe you stated that the instructions were that the quantity to be inserted was a figure which was 85 per cent of the dealer's past purchases. Did I correctly understand your statement?

A. The percentage figure used was 85 per cent. Our representatives were instructed not to insert a figure there as the minimum quantity that would exceed 85 per cent of the dealer's past known sales.

Q. Well, then, the 85 per cent was not to be used as a fixed amount?

A. As a flat figure, no.

Q. Yes.

A. No, that was a maximum. If the dealer elected or insisted, as many dealers will, on a smaller figure, that was the figure that was entered in the contract.

Q. Mr. Dixon asked you concerning these 26 dealers to whom Richfield has sold TBA products directly. Do you know who sets the quantity figures that determines the particular discounts that these large volume purchasers are able to secure?

A. The quantity discounts are established by the manufacturer of those products. They are included in the manufacturer's posted schedule of discounts as they apply to [fol. 2966] their products, and they are available to any dealer or any customer who can qualify.

Q. Are those quantity discounts that these particular 26 large buyers are able to get—have those been determined by Richfield?

A. Oh, no. That is not determined, they are not determined by Richfield.

Q. Do you know whether or not these particular 26 buyers are able to purchase from Richfield's TBA distributors?

A. Well, I tried to explain that this morning, that since this small group of buyers or dealers—since their sales are of such volume as to entitle them to discounts, the maximum discounts as posted by the manufacturers on those various products, it would be impossible for the TBA distributor to sell them because he would be selling them at his cost.

Q. Do I understand from that that these purchasers are entitled to the same volume discounts as the TBA distributors?

A. That is right. In other words, they are commanding a volume of business that entitles them to discounts as great as enjoyed by the TBA distributor.

Q. And is that Richfield's reason for selling these people directly?

A. That is the only basis on which they could be sold.

[fol. 2967] Q. Mr. King, there was testimony by a Mr. Ogburn earlier in this case that he was operating a service station in Reedville, Oregon, and that Richfield had 3-C con-

tracts with a Mr. Mathis covering the station. This was a 3-C transaction. That the property was owned by Mr. Mathis. I would like to ask you if Richfield had many 3-C transactions with a person operating the station as a different person than the dealer who signed the 3-C papers?

A. No, definitely not, and this instance here is the first exception to our routine that has come to my attention where the operator is a different person than the lessor.

Q. And with whom you have the 3-C contract?

A. With whom we have a lease.

Q. Mr. Ogburn also testified that a Mr. Froman, a Richfield employee, came to this 3-C station and filled out a form 205. You are familiar with the form 205?

A. That is the service——

Q. That is a survey?

A. That is a form used by our merchandising staff in the inspection of our L-O stations, yes.

Q. Do you know what Mr. Froman's employment was during the years 1945 to 1950, at which time he visited Mr. Ogburn's station?

A. Well, he was assigned to our merchandising staff and I believe that he was what we call a special retail repre-
[fol. 2968] sentative.

Q. What are the duties of a special retail representative? I do not believe we have discussed this classification of employee before.

A. The special retail representative, of which we have maybe two or three in each of our divisions, is an individual whose responsibility it is to visit our leased out service stations and to inspect the premises, particularly the restroom facilities and the state of cleanliness and the housekeeping at that station. When he visits a station he makes out a report of the items that he finds that are irregular or that should be improved, following which he has a discussion with our operator, and he tells the operator who he is, what his capacity is. And I would like to point out here that the special retail representative is not the individual who normally transacts business with that operator.

Q. When you speak of an operator, what type of station are you referring to?

A. L-O station. In other words, he goes on to tell the operator where he is deficient in the operation of the station,

principally cleanliness and housekeeping, and tells him he will be back again in a matter of weeks and he will make a further check and he hopes that the conditions will be corrected. And he makes a report to the merchandiser who calls on that station, as well as a report to the division man-
[fol. 2969] ager. This man is accountable only to the division manager. On subsequent trips he comes back there. If the condition that he complains about has not been corrected, then this individual has the authority to cut right across the organization lines and make a recommendation to the division manager that the operator in that station have his lease cancelled because he has failed to comply with our standards of cleanliness and housekeeping and so on.

Q. Do the duties of a special retail representative pertain to any stations other than L-O stations?

A. No. His activities are confined by our instructions to L-O stations.

Q. Do the duties and activities of special retail representatives have anything to do with merchandising, even in the L-O stations where he goes, as to the type of products sold or the manner of display of products?

A. No. I have tried to point out that his responsibility is quite different from that of the merchandiser who is there to teach the operator in service station operation and all the various merchandising procedures that we have, whereas this individual is really—well, you might compare him to a health inspector.

The Court: He goes around policing it?

The Witness: He is policing it from the standpoint of cleanliness particularly, the restrooms and the housekeeping [fol. 2970] of the station and so on.

The Court: He would not report it if he saw an unauthorized sign or unauthorized merchandise display. He would not report that, would he?

The Witness: That would be the merchandiser's responsibility, keeping in mind, your Honor, that the people we talk about call only on our leased out stations.

The Court: Yes, all right.

The Clerk: Defendant's Exhibit S marked for identification.

(The document referred to was marked Defendant's Exhibit S for identification.)

By Mr. Paradise:

Q. Have you issued written instructions covering "work habits" of special retail representatives whom you have described?

A. Yes, instructions have been issued covering the work habits of this individual, like every other position we have in the department.

Q. I will show you Defendant's Exhibit S for identification bearing the title "Work Habits-Special Retail Representative," and ask you if those are the instructions to which you referred?

A. This is entitled "Work Habits-Special Retail Retail Representative." Yes, it is.

Q. And those work habits are issued to these people as their instructions?

[fol. 2971] A. Yes, sir.

Mr. Paradise: Defendant offers Exhibit S into evidence.

The Court: All right.

The Clerk: S in evidence.

(The document referred to was marked Defendant's Exhibit S and received in evidence.)

By Mr. Paradise:

Q. Mr. King, if Mr. Froman, the special retail representative that you have referred to, visited a 3-C station sometime during 1949 to 1950 and made out a form 205, was that within or outside of the instructions that you have issued to that group of employees?

A. Very definitely it would be outside the scope of his responsibility or his authority.

Q. Have you had knowledge that that incident had occurred?

A. No, I have had—I had not.

Q. Other than by my question to you?

A. No, I have no knowledge about it.

The Court: Where would he get the blanks for making such a report?

The Witness: What did you say, sir?

The Court: Where would the man in another line of merchandising get a form on which to make a report?

The Witness: Well, I believe there was introduced in evidence here, your Honor, a form 205, which is the ——

[fol. 2972] The Court: Well, I know that. But where did he get it? You say it was out of his line. Where did he get that?

The Witness: This special retail representative would have it in his inspection of our leased out stations. Now, if he went and called on another type of station, then that would be without his scope to do so and to use that form.

The Court: I see. All right.

By Mr. Paradise:

Q. Calling your attention, Mr. King, to Government's Exhibits 28 and 28-A that were introduced this morning, calling your attention particularly to Government's Exhibit 28 I ask you to read the second paragraph of that letter. By the way, this letter, although it apparently is signed by "W. T. Dinkins" bears the typewritten initials "W. G. K. Jr." Does that refer to you?

A. Yes, sir.

Q. Did you prepare this letter? Did you dictate and prepare this letter?

A. Yes, sir.

Q. The second paragraph of the letter states:

> "Just recently, Mr. McCracken advised our people that he intended to serve us with a notice to relinquish our lease inasmuch as he wished to put in another brand of gasoline and operate the location as a cut-price station."

Preliminarily, this particular station was a 3-C station, [fol. 2973] was it not?

A. Yes, sir.

Q. To which this letter relates?

A. The number there designates it as a 3-C station.

[fol. 2974] Q. Now, the statement that Mr. McCracken wished to put in another brand of gasoline, do you have knowledge of whether Mr. McCracken at that time wanted

to put in another brand of gasoline and continue to handle Richfield gasoline at the same time, or whether he wanted to displace Richfield gasoline completely?

A. Mr. McCracken wanted to displace us completely.

Q. Now, this letter was addressed to Mr. DeMartini. I am referring now to Government's Exhibit 28.

I show you a letter dated August 11, 1949, addressed to you and signed by Mr. DeMartini, and ask if this is the letter you received in reply to your inquiry?

Mr. Paradise: Will you mark this, please?

The Clerk: Defendant's Exhibit T, marked for identification.

(The document referred to was marked Defendant's Exhibit T, for identification.)

Mr. Paradise: Would you now read my question?

(The question was read.)

Mr. Paradise: This latter letter is the one marked Defendant's Exhibit T, for identification.

The Witness: Yes, this is the answer to my letter to Mr. DeMartini of July 22nd.

By Mr. Paradise:

Q. The date is August 11, and then a blank with a "9" [fol. 2975] following. Does that refer to 1949, do you know?

A. Yes, that does relate to 1949.

Mr. Paradise: The defendant offers Exhibit T in evidence.

The Court: It may be received.

The Clerk: Exhibit T in evidence.

(The document, heretofore marked Defendant's Exhibit T, for identification, was received in evidence.)

Mr. Paradise: This is my last question, your Honor.

I would like to offer as Defendant's next in order a letter of Mr. DeMartini, dated August 19, 1949, addressed to Mr. Howard M. Van Denburgh, the attorney for Mr. McCracken, the person to whom these last letters have related.

Mr. Dixon: May the record show that is the original letter.

Mr. Paradise: And to which is attached also the original envelope in which it was sent to Mr. Van Denburgh.

The Court: All right.

The Clerk: Defendant's Exhibit U in evidence.

(The document referred to was marked Defendant's Exhibit U, for identification.)

Mr. Paradise: That is all.

The Court: Have you any further questions?

Mr. Dixon: Yes, your Honor.

The Court: Go ahead. We will finish with him. I forgot [fol. 2976] tomorrow is a holiday, so we will try to cover as much ground as we can today.

Recross-examination.

By Mr. Dixon:

Q. Mr. King, your Exhibits R, as I understand it, are executed by Richfield and made a part of the sales contract at the time it is executed by the 3-C and the 337 dealer, and remains in effect as long as the sales contract to which it is appended is in effect; is that correct?

A. Yes.

Q. When you give what you call a subsidy to your L-O operator, that is done orally, is it?

A. No, that is covered by a subsidy letter, Mr. Dixon.

Mr. Dixon: Do counsel have a copy of the subsidy letter?

Mr. DeMartini: That is in evidence as Defendant's Exhibit F.

By Mr. Dixon:

Q. Now, that subsidy is conditioned, is it not, Mr. King, upon the L-O lessee reducing the price of his gasoline, that is, the gasoline that he is selling at that outlet, a stipulated amount below the posted retail price of Richfield?

A. Yes. Where we find that the L-O operator is confronted with cut-price competition, we give him the privi- [fol. 2977] lege, extend to him the privilege of reducing his price to meet that competitior, in which event the subsidy letter is signed, and he is given the subsidy. However, if he does not elect—which is quite probably the exception rather

than the rule—to reduce his price to meet the competition then, of course he does not receive the subsidy.

Q. So that it is conditioned upon his making a reduction in the retail price of his gasoline?

A. Before we would make the subsidy, yes, sir.

Q. And the reduction in that price must equal, or I mean must be twice the amount of the subsidy per galion, must it not?

A. Oh, no, sir.

Q. Or is it the same?

A. In other words, when we authorize a reduction, we extend to him a subsidy exactly in the same amount as the reduction.

The Court: Are you referring to these so-called marginal letters?

Mr. Dixon: No, I am talking about the subsidies, now, to the L-O operators, Judge,——

The Court: I see.

Mr. Dixon: —which are different.

The Court: All right. In the marginal letter I noticed that, as a result of these adjustments, he retained the four [fol. 2978] per cent margin, or isn't that the purport of those agreements?

The Witness: Well, I think I can explain it to your Honor this way: The normal mark-up, the dealer's mark-up above the wholesale or tank-wagon price on one grade of gasoline is four cents. We will use that as an example. Now, an extra margin letter is used by Richfield when we solicit that dealer's business and we encounter a competitive price by other oil companies in which they agree to sell him at X cents below the tank-wagon price. That gives him then a margin, you see, in excess of four cents.

The Court: All right. But, now, getting back to the subsidy, by the subsidy to him you maintain the same level?

The Witness: That is exactly right. In other words, with the L-O operator, in a normal situation his prices are four cents above the tank-wagon price. Now, if he has to reduce his retail price two cents, we subsidize him two cents, and he retains the four cents.

The Court: I didn't get the distinction between the two procedures, and this makes it clear.

By Mr. Dixon:

Q. Mr. King, it is a fact, is it not, that your salesmen do file reports to their supervisors on unauthorized signs at 3-C and L-O stations? I mean at 3-C and 337 stations?

A. We have, to my knowledge, no form on which we have [fol. 2979] issued instructions or requested our sales personnel to report competitive signs.

Q. What is meant, if you know, by the classification "F"?

A. An "F" account?

Q. Yes.

A. I will have to count on my fingers. I believe "F" refers to the classification of a contracted account under the 337 contract.

Mr. Dixon: We ask that these be marked for identification as one exhibit, your Honor, next in order, the same being Form 205, dated 7-48, entitled, "Survey of Service Station Operations," relating to the dealers named therein, and appear to be signed by R. M. Dart, on behalf of the defendant. It is stipulated, as I understand it, that subject to check and verification these may be used in lieu of the originals.

The Court: All right.

The Clerk: That is Government's Exhibit 30, marked for identification.

(The document referred to was marked Plaintiff's Exhibit 30, for identification.)

Mr. Dixon: That is all, your Honr.

Mr. Paradise: I have just one question pertaining to this last exhibit.

The Court: All right.

[fol. 2980] Redirect examination.

By Mr. Paradise:

Q. Mr. King, this last exhibit of the government, a group of Form 205's, are all apparently signed by Mr. R. M. Dart for Richfield. Do you know who Mr. R. M. Dart is?

A. I don't recall the individual right now. I would have to look at our records.

Q. To shorten this, Mr. King, if we would tell you, and it is subject to verification from Richfield's records, if I should tell you that Mr. Dart is a special retail representative, would your testimony concerning his authority be the same as what you have heretofore testified to regarding Mr. Froman in his visits to the Ogburn station?

A. Yes, sir.

Mr. Paradise: No further questions.

Recross-examination.

By Mr. Dixon:

Q. My attention was directed to the fact that one of these forms relates to service station "8027-E." Do you know what type of station that would be, 8027-E?

A. Yes, that is the symbol we apply to the 3-C account.

Mr. Dixon: Thank you. That is all, Mr. King.

(Witness excused.)

[fol. 2981] The Court: All right, gentlemen, the court will now recess until 2:00 o'clock.

(Whereupon, at 12:35 o'clock p. m. a recess was taken until 2:00 o'clock p. m. of the same day.)

[fol. 2982] Los Angeles, California, Tuesday, May 29, 1951
2:00 P.M.

The Court: All right, gentlemen, call your next witness.

Mr. Dixon: The Government offers into evidence, your Honor, Government's Exhibit 30 for identification.

The Court: I thought it was in.

Mr. Dixon: I thought so, too, but the clerk states not.

The Clerk: It was just marked, your Honor. Is it admitted, then?

The Court: Yes.

The Clerk: 30 in evidence.

(The document referred to was marked Plaintiff's Exhibit 30 and received in evidence.)

GRANT L. DUSTO, called as a witness by the defendant, being first sworn, was examined and testified as follows:

Direct examination.

By Mr. DeMartini:

Q. Will you state your name, please, and spell it for the reporter?

A. Grant L. Dusto, D-u-s-t-o.

Q. What is your home address, Mr. Dusto?

A. 330 Aragon Boulevard, San Mateo.

Q. What is your present occupation with Richfield?

A. Assistant division manager in charge of merchandis-
[fol. 2983] ing for the central division.

Q. How long have you had that position?

A. Since 1940.

Q. Will you give us a brief description of your duties?

A. I am responsible to the division manager for the overall operation of all L-O service stations in the central division, and for the training and direction of all the merchandising representatives.

Q. And who are your subordinates who report to you?

A. Special representatives and territorial merchandisers.

Q. How many men are under your jurisdiction of this classification?

A. Of that classification?

Q. Yes, of those two that you have mentioned.

A. 13.

Q. Is it correct to state that you and they deal only with L-O operations?

A. That is correct.

Q. And you have no dealings with the independent dealers?

A. None at all.

Q. From whom do you receive your instructions?

A. From the division manager.

Q. And do you instruct and advise your subordinates in accordance with the instructions that you receive?

[fol. 2984] A. That is correct.

Q. Can you state whether they carry out your instructions as you give them, that is, your subordinates?

A. I believe they do.

Q. How do you know this?

A. I take very frequent trips into the field and meet those men wherever they happen to be working and call on the L-O operators with them.

Q. Now, do any of these instructions relate or pertain to the sources from which they are to procure prospective L-O operators?

A. They do.

Q. Will you state what the instructions are in that regard?

A. The merchandising representatives are instructed to procure L-O operators from a number of different sources. Quite frequently we use men who are employees of our L-O operators, have two or three years experience, and seem capable of operating their own stations. In some instances we advertise in the local newspapers, and we contact practically all types of businessmen in the community in which we are attempting to find prospective operators.

Q. Do any of your instructions relate to the method and manner of interviewing these prospects that have been secured?

[fol. 2985] A. They do.

Q. What are these instructions, Mr. Dusto?

A. The interviewing of prospective operators is usually conducted in two stages or two separate interviews. The first one is usually for the purpose of determining the applicant's qualifications and eligibility, that is, we inquire into his family background, the number of dependents that he has. We find out something about his previous business experience, if any, as to the various types of work he has done. We determine whether or not he has had any sales experience of any kind, any mechanical experience of any kind, and various other lines of questioning which may adapt him for his type of work.

Q. Are they to consider, for instance, his personal appearance and character references?

A. That is correct.

Q. Why do you instruct them to consider these matters in securing an operator for an L-O station? What is the purpose?

A. Well, we attempt to find the best possible type of

men because we want to do, of course, the best job we can with these L-O stations, and the better type of men who are placed in these stations, usually the better we get along.

Q. Do you prescribe any forms to be used in connection with securing applicants?

[fol. 2986] A. We do use two different forms, especially when we haven't any stations available at the time. They are usually kept on file in the event a station is available.

Q. I will show you some forms that are attached to Defendant's Exhibit A, Mr. Dusto, and ask you to indicate which ones are used by you or your people?

A. We use this one, whatever it is.

Q. "Application for Prospective Sublessees"?

A. That is right. This is another adaptation of the same thing, "Application for Service Station Sublease." This is one I designed myself. That is why it is familiar. That is "Application for Employment"—no, that is not right, either. I take that back. This form here, this mimeographed form, was taken from this company sheet and contains the same information as form 901, I believe it is.

Q. And you use those two forms entitled "Application for Employment"?

A. That is right.

[fol. 2987] Q. Do you issue any instructions to your merchandisers relative to the advice or directions to be given to an L-O operator at or before the time he is installed in the station, that is, after he has been selected as a prospect?

A. We do.

Q. Is the merchandiser given instructions as to discussing with a prospective L-O operator at or before the time he moves into the station the following matters: uniforms?

A. Yes, he is instructed to notify the prospective operator that he and his employees will be required to wear the regulation Richfield uniform.

Q. The number of employees that are to be used to operate that station?

A. If the station has been in operation previously, he is instructed to—of course, having previous experience, he knows how many men it takes to operate it, and he is told to tell the prospective operator about the number, and if the station is a new unit, the merchandiser usually informs him as to the minimum crew that that station will require

in order to provide man-power coverage for the hours that it is open.

Q. Hours of operation of the station—going back in each case to the base question?

A. That is correct. He tells the prospective operator what hours the station is to remain open for business.

Q. As to the matter of the cleanliness of the station and of the rest rooms?

[fol. 2988] A. That is usually brought out at the time the merchandiser goes over his 542 lease with him, and he is informed at the time that he is expected to keep the station in a reasonably clean condition, with particular attention to, of course, the rest rooms.

Q. Is any reference to be made to his personal cleanliness and appearance?

A. That subject is also gone into quite at length.

Q. What do they tell him?

A. Well, we usually find out the type of individual we are talking to determines the stress we have to put on that particular subject. If this prospective operator is the type of man whom normally you would expect to keep himself clean, chances are that is the way his mother brought him up, and you won't have trouble with him, but if you suspect he might have a tendency to be a little careless, then a great deal of emphasis is laid on the fact that he has to come to the station clean-shaven and change his uniform as often as necessary to present a good appearance when he contacts the public.

Q. What do you understand by the term "pump island procedure"?

A. The pump island procedure that we refer to by the name of Richfield Safety Service is a procedure which has been worked out to accomplish two things. First, to enable [fol. 2989] the motorist who comes in for service to be served quickly and efficiently, thus saving time for both himself and the operator, and also to give the operator or his assistants the opportunity to determine anything that that car might need, which might cause inconvenience or possibly an accident if it were not taken care of within a reasonably short length of time.

Q. Does the merchandiser instruct the prospective L-O operator on that subject?

A. You mean before he moves in the station?

Q. Or does he do it at any time?

A. Well, he tells him about it before he checks him in, and then he actually instructs him in the service after he has been installed.

Q. Is the operator advised or instructed as to the manner in which he should procure business for that service station from the surrounding area?

A. In the great majority of cases, the merchandiser representative makes what we call a market survey with the man, in which, through a procedure which has been very carefully worked out, the operator is given a picture of the amount of gasoline volume there is in his immediate marketing area, and from that point on his sole mission in life is to help the operator get that business which is available.

Q. Does the merchandiser, pursuant to your instructions, [fol. 2990] advise the operator of Richfield's advertising and his method in using the same?

A. The operator receives most of his knowledge of the company's advertising from attending a meeting, which are usually held in the spring and the fall, and then after he has received general knowledge of what the advertising consists of, then his merchandiser works with him to enable him to cash in on the benefits of that advertising in his own particular neighborhood.

Q. What are some of the advertising aids and helps that are given to the operator?

A. Well, I may be a little confused. To me "advertising" is one thing, and "dealer helps" is something else, Mr. DeMartini.

Q. Well, there are advertising aids given to him from time to time; is that not true?

A. Those are what we call dealer give-aways, such as our wildflower seeds, and wildflower books, and Christmas carol books, and numerous other things of that nature, road maps, by which the operator can imprint the location of the station, and which are either passed out to the people that come in the station, or which are given out as what we call door openers at the time the merchandiser and the operator make calls in the neighborhood. In other words, the merchandiser goes out and takes the operator with him, and [fol. 2991] shows him how to use these things.

Q. Now, what is the prospective operator told as to the brands of products that he is to handle in the station? Take them in this order, gasoline, oil, and grease, and our approved TBA line, what is the operator told in that respect?

A. So far as petroleum products are concerned, he is told that we will expect him to handle Richfield products exclusively. So far as TBA merchandise is concerned, he is told that we will expect him to handle Richfield approved brands, and to secure them from the local TBA distributor to the extent that the TBA distributor is able to supply him.

Q. Does the merchandiser give him any reasons, pursuant to your instructions, at this or any time as to why he is to handle those products exclusively?

A. Well, in my particular territory, when the question comes up, the merchandiser is instructed to tell the prospective operator that Richfield created this station for the purpose of selling its own petroleum products, and we did not build the station to provide competition a place to do business.

[fol. 2992] Q. Is the operator at or before the time of being installed in the station advised as to how he shall order supplies or how he shall get them?

A. You mean petroleum products?

Q. Yes, petroleum products, TBA, the whole line.

A. Yes. He is told how he shall order his petroleum products and where he shall place his orders, that is, with whom.

Q. With whom are the orders to be placed?

A. If the station is located in what we call a branch, a salary-operated branch, he is usually served gasoline on a basis of so many days a week, that is, he will get deliveries, let us say, Monday, Wednesday and Friday, or maybe he will get them Tuesday and Saturday, depending upon the delivery schedule which we have worked out to effect the greatest possible economies in delivery costs. If it is located in a commission agency operated territory, he may be on a delivery schedule basis of the commission agent's, and if he is receiving his gasoline on a direct from terminal basis, he places his order with the commission agent.

Q. Is the operator advised in any manner as to Richfield's credit card program and the products approved for it?

A. Yes. He is advised in complete detail about our whole

credit card program, not only as to how he may solicit credit card business and get new credit card customers, but the [fol. 2993] types of persons who are most likely to be approved as credit card customers, the manner of filling out the applications. And he also has full and complete instructions as to the method of preparing the credit card invoice and as to the quantities and amounts of petroleum products he may sell to a customer. And he is also instructed as to the various items of TBA merchandize which are authorized for placement on a credit card. And then he is handed a credit card manual or credit card folder which contains all this information for reference purposes.

Q. Is the operator advised as to the kinds and nature of signs that he may display at the station?

A. He is instructed that he may not display any signs which are not in our approved classification.

Q. What signs are in the approved classification?

A. The only signs which are approved at this moment are the familiar diamond-shaped Goodyear signs which are on the electrolier poles. There are several decalcomanias which we put on the windows announcing that credit card applications are received, and another one to the effect that that particular operator is qualified to perform automatic transmission service, and that is about the size of it.

Q. Are there any specific instructions given to him relating to displaying signs of any products that might be competitive with ours, with Richfield?

[fol. 2994] A. Well, I think that comes under the question I have just answered. He is to display no signs except those we authorize him to display.

Q. Is it correct to state, Mr. Dusto, that occasionally Richfield holds meetings for these operators at which they are instructed as to certain policies and practices of the company? Is that correct?

A. That is correct.

Q. What instructions are given to the L-O operator as to attendance at these meetings?

A. Before he takes over a station he is told that we expect him to be present and that he will try to get as many of his assistants to attend these meetings as can be spared from the operation of the station.

Q. What is he told as to Richfield's program of mer-

chandising to a station, if anything? That is, at or before the time he is installed?

A. It is a rather large quantity, Mr. DeMartini.

Q. Well, do the best you can. Let me put it this way, to cut it short: Is he told that merchandisers will call upon him from time to time?

A. Well, I can answer that in a few words, I think. He is told that over the period of years we have devised a comprehensive plan of service station operation which has been revised from time to time to keep it up to date, and that this plan, known as the Richfield plan for profits, is contained [fol. 2995] in a series of booklets, these booklets covering every phase of service station operation, and that the merchandising representative in whose territory the station is located will go over the complete plan with him. And he is told at any time he encounters any difficulties in his operation at all, whether it is a matter of being unable to develop enough patronage for the station or whether it is a credit problem or an accounting problem or bookkeeping problem, that the merchandising representative is the man for him to turn to for counsel and advice.

Q. Now, taking the incident of an operator being installed in a station to replace an operator whose operation of that station is being terminated, what is the new operator told, if anything, as to what he is required to buy, first, in the line of petroleum products?

A. He is told that he will be required to buy all of the Richfield petroleum products which the outgoing operator has on hand.

Q. What about petroleum products that are not Richfield's products?

A. He is not only told that he does not have to buy them, but that he should not buy them.

Q. What is he told about the items falling in the TBA classification?

A. He is told that he will be required to take from the [fol. 2996] outgoing operator all of the salable approved TBA items at the current wholesale value.

Q. What is he told about so-called unapproved items?

A. He is told not to buy them at all.

Q. Is he told anything relative to the purchase of equipment from the outgoing operator?

A. If the outgoing operator has equipment of any kind which we approve of on our approved list, the incoming operator is told that he will be required to purchase that equipment from the outgoing operator at its current depreciated value.

Q. Do I understand by that statement, that Richfield has specific approved equipment which is to be used at the station by the operator?

A. That is correct.

Q. And what is the nature of this equipment?

A. It consists of lubrication equipment and lubrication tools, battery service equipment, chargers, volt meters, and tools, tire equipment, a certain amount of car-washing and polishing equipment which is normally necessary for the operation of any service station.

Q. And does Richfield designate the brand and type of equipment which is on its so-called approved list?

A. That is correct. There are presently three brands of lubrication equipment, for example.

[fol. 2997] Q. At this time is anything told to the incoming operator as to any obligation that Richfield will assume at the time he terminates his operation of the station as to whether Richfield will assist him in disposing of any of the items that he has purchased?

A. Yes. He is told that, should he check out of the station, his successor will be required to purchase his merchandise and equipment on the same basis.

Q. By "the same basis" you mean that he will be required to purchase the approved items, but that he not only would not be required to, but not allowed the unapproved items, is that correct?

A. That is correct.

Q. Is anything told to a new operator as to the amount of stock he should have on hand for the operation of the station?

A. Yes. The new operator and the merchandiser usually get together and develop what we call a working inventory. As far as petroleum products are concerned it is based on the size and frequency of deliveries, largely, and the monthly gasoline volume of the service station. So far as the TBA is concerned it is also based on the over-all gasoline volume on a monthly basis, plus adjustments for the

requirements of that particular neighborhood so far as types and sizes of various items of merchandise are concerned.

[fol. 2998] Q. Do you know what the term "direct delivery" means as used in your operations?

A. I am quite familiar with the subject.

Q. Will you describe what it is, Mr. Dusto?

A. A direct delivery is the instance when gasoline is delivered direct by highway transport from a terminal into the storage tanks at a service station, by-passing the local bulk plant entirely.

Q. What is the purpose for direct deliveries?

A. The purpose of direct deliveries is to enable the company to effect economies in transportation and delivery costs by delivering less frequently and more at one time.

Q. Now, do I understand that in order to accomplish direct deliveries a certain amount of storage is required?

A. That is correct.

Q. And does this ever entail the enlargement of storage in existing stations?

A. If the existing station is an older unit that has small tanks in it, it quite frequently does.

Q. What do you do under the circumstances of installing storage for direct deliveries insofar as the operator is concerned?

A. You mean in——

Q. Do you discuss the matter with them at all?

[fol. 2999] A. Yes. He is told in advance that the station is going to be placed on a direct shipment basis, and that the installation of these tanks—and I am talking about an older station now—will take place on or about a certain date, and that he shall prepare himself for it in a financial way. He is asked pointedly whether or not he has enough money to purchase gasoline in the quantities in which we will expect him to receive it. And, of course, the answer to that is either yes or no. And in the event it is "no" and he does not have enough money to buy in larger quantities, then we usually work out what we call a direct shipment loan with the operator.

[fol. 3000] Q. That loan is for the purpose of enabling him to establish the necessary credit or money with which to buy larger quantities of gasoline; is that correct?

A. That is right. And in every sense it is a deferred payment plan for buying a large amount of gasoline. When his loan is paid off, he has built up his inventory by just that much, which he owns.

Q. Is there some interference with the operations of the station during the time the tanks are installed?

A. Yes, in some cases there is quite a bit.

Q. Do you do anything for the operator in those instances?

A. Well, we have made adjustments in a number of cases. We put some big tanks in last winter, when the operator, through no fault of his own, was tied up for as much as 10 days, because the installation of these things could not proceed because it was raining. In those cases we have made some sort of an adjustment, usually by a temporary abatement in his rental, or something of that nature, to compensate him for the business that he lost.

Q. What do you understand by the term "blue sky"?

The Court: Just a moment. You used the word "compensate." Do you mean you are aiding him in any way except just by the rent? You do not mean you give him something in addition to forgiving the rent, do you?

[fol. 3001] The Witness: No.

By Mr. DeMartini:

Q. What do you understand the term "blue sky" means?

A. Well, I understand it as funds or payment which, shall we say, the new operator might pay to the outgoing operator for his good will, or something of that nature.

Q. Do you give any instructions to your merchandiser as to advising the operators, prospective operators, as to the payment of "blue sky"?

A. Yes. The merchandiser is instructed to see to it that no money changes hands other than the exact value of the merchandise and the equipment; no blue sky.

Q. Why do you give those instructions as to blue sky? Why do you allow no payment of blue sky?

A. Well, because the outgoing operator has nothing to sell other than his merchandise and his equipment.

Q. In other words, he has no good will which he is to dispose of?

A. That is correct.

Q. Is the merchandiser given instructions relative to discussing with a prospective operator as to the terms of the lease, referred to as the 542 or L-O lease?

A. Yes, the merchandiser is instructed to go over the 542 lease with him in detail, paragraph by paragraph.

Q. What is he told, in particular, to advise the operator [fol. 3002] as to the 24-hour termination privilege in that lease?

A. He is told that the 24-hour cancellation privilege, of course, is a mutual one, and we insist upon it being there. It is a question that is always brought up, by the way. We insist on its being there for our own protection, and for the protection of our other L-O dealers, so that we can recover possession if the operation becomes substandard, or any thing of that nature.

Q. What is he told, if anything, with respect to the rental provisions and the fixing of rents under the lease?

A. He is told that the basic rental policy for all stations is one cent a gallon on all the gasoline delivered to the station during the month, with a certain stipulated minimum. And then it is explained to him what the rental in that particular station has established there.

Q. How is this minimum fixed or established?

A. In our territory the minimum is usually established on the basis of approximately 75 to 80 per cent of the previous year's average monthly gallonage. For instance, if the average for the prevous year was, shall we say, 10,000 gallons, then the rental would be established at one cent a gallon, with an $80 per month minimum.

Q. Is it correct to say that your aim is to arrive at a gallonage figure of a rental of approximately one cent a [fol. 3003] gallon? Is that it?

A. That is correct.

Q. What do you understand by the term "flat rental program" or "policy," if there is one?

A. The flat rental policy was established several years ago to provide an incentive for some of the older operators to effect further increases in gallonage, in which, providing the gallonage for the previous year had not been subnormal, the operator was given the option of paying a flat rental,

based on the previous year's average monthly gallonage.

Q. By "flat rental," you mean a rental of so many dollars per month without any gallonage rental; is that correct?

A. I mean so much and no more.

Q. In accordance with your instructions and practice, when is the merchandiser told to procure the signature of the prospective L-O operator to the lease, the Form 542 lease, that is, in point of time of installation?

A. The merchandiser is instructed that when he is making a change of operators, the first thing he is to do after he arrives at the station in the morning,—let's say the check-out is set at 7:00 o'clock, the first thing to do is to get the outgoing operator to sign his termination papers and the incoming operator to sign his 542 papers. That is the first thing he does before he does anything else.

[fol. 3004] Q. Then what is done with that lease that he signs?

A. Those documents are then mailed to the division office for execution.

Q. And after the execution, is a copy returned to the operator, a signed copy?

A. Yes, it is mailed to him.

Q. Is the merchandiser instructed to advise an operator or prospective operator in any manner as to the possibilities of procuring another station, or better station, under any circumstances?

A. So far as the possibility of securing another station in the central divis-on territory, we do not permit him to have another one, that is, a second one.

Q. No; I meant a successive one, not two together.

A. We usually don't mention that unless the prospective operator himself brings it up. It does come up from time to time, and especially where you might have an extremely high type chap, but the only station that is available in the area might be something that is not quite new and modern. In that event, if he brings the question up, he is then told if he does a good job with the station that we are talking about in particular, that he will be considered for a better unit when one is available.

Q. Do you know of any instances where an operator has been promoted to a better station?

[fol. 3005] A. Yes, I do; quite a few.

Q. Can you name any of them, within your own knowledge?

A. About a year ago we checked a man by the name of Rene Pons out of 17th and El Camino in San Mateo, which was an old ramshackle unit, and put him in a new station at 23rd and El Camino in San Mateo.

Then we had a young man by the name of Crawford in Eureka, who was at Wabash and Eel, a small neighborhood station, and we built a new station on the highway just south of town, on Broadway I think it was, and he asked for the unit, and I authorized him to have it, on the recommendation of the branch manager.

Q. Without naming any more, there are other instances that you know of, Mr. Dusto?

A. Yes, there are quite a few.

Q. Now, let us pass to the station where the operator is installed and is commencing to do business. Does the merchandiser continue to have any relation or association with that operator, and, if so, what is it?

A. At the outset he is instructed to spend, if the circumstances permit, a minimum of five days with that new operator during which he covers in a general way all of the general practices and policies which we expect to be maintained at our L-O units.

It may be that he can't spend five consecutive days there, [fol. 3006] but he is instructed to cover this same material with the man over as limited a period as he can commensurate with the demands of the other things that he must do at other stations.

Q. Does the merchandiser instruct the help of the operator, or give the operator instructions as to instructing his own help at this time?

A. The merchandiser usually takes the attitude that he expects the operator to train his own help, but quite frequently the merchandiser must demonstrate to the operator how this training should be done, because in most instances the operator himself is not trained in training, if I may put it that way.

Q. Thereafter, how often does the merchandiser call on this station, pursuant to your instructions?

A. It is difficult to answer that question, because the merchandiser is instructed to spend 75 per cent of his time with the weaker 50 per cent of his operators, so that if he was a capable individual and capable of operating without a great deal of assistance or supervision, he might call on him as little as once a month, and if he was at the other end of the line he might spend—he might be there every week. In fact, he might be there for as much as two days every week. It all depends on the need.

Q. Are you familiar with the form entitled "Survey of [fol. 3007] Service Station Operations," bearing form number 205. Incidentally, it is in this case as Defendant's Exhibit C. You are familiar with that, are you?

A. Yes, I am.

Q. Is the merchandiser instructed to use that form in connection with his contact with the L-O operators?

A. He is instructed to prepare that form at least every sixty days.

Q. How is that form used? Can you describe the manner of its use?

A. The merchandiser prepares that in conjunction with the operator. In other words, the two of them get together, and the merchandiser endeavors to get the operator to see the station as it actually is, which isn't always easy, but to get an agreement that certain things must be done, and then to get any operator, of course, to attempt to correct these situations, whatever they may be. It may also develop in the course of making this survey, that there are some things to be done at the station which are Richfield's responsibility, like repairs of one sort of another, or replacement of worn-out equipment possibly.

Then at a later date, of course, when another one of these surveys is prepared, then the operator and the merchandiser get together and see whether they are making any progress. That is the whole point of the form.

[fol. 3008] Mr. DeMartini: Will you mark this, please?

The Clerk: Defendant's Exhibit V, marked for identification.

(The document referred to was marked Defendant's Exhibit V, for identification.)

By Mr. DeMartini:

Q. I will show you a sheaf of printed pages, Mr. Dusto, which bear the form number 1071, the different pages of which appear to have different titles and which is marked Defendant's Exhibit V, for identification. I ask you if you know what that form is, and describe the manner of its use, if you please.

A. Yes, I am very familiar with this form. This is a training guide. In it, broken down by the various phases of service station operation, are practically all of the service and sales procedures which the operator would need to know about, and the merchandiser uses this as a record and guide of his activities in connection with the training of this particular operator.

Q. It carries through the various phases of training; is that correct?

A. That's correct.

Q. What is done with it after it is filled out, or is it filled out, or is it just used as a guide?

A. Well, it is used as a guide. It is one of those things that is never complete. It has some check marks on it, [fol. 3009] which have certain symbols which mean that the merchandiser has discussed this or that with the operator, and then when he has handled it,—I mean, when the operator, let us say, is proficient in, let's say, servicing automatic transmissions, he puts another symbol on, and that means that the operator is now proficient in that service. Of course, he finds out, as time goes on, that the man may be proficient now, and three months later has forgotten, or has slipped a little bit, and then he goes back and starts the same thing all over.

So it provides at the top, where he inserts the numbers of the various stations under his supervision, so that he has a space here for as many *of* 25 stations, if he has that many in his territory.

Q. And those are used by all of your merchandisers?

A. Those are used by all the merchandising people.

Mr. DeMartini: I will offer this in evidence.

The Court: It may be received.

The Clerk: Exhibit V in evidence.

(The document, heretofore marked Defendant's Exhibit V, for identification, was received in evidence.)

[fol. 3010] By Mr. DeMartini:

Q. The instrument that I showed you has a print date 1950. There were previous forms of like nature that were in use, is that correct?

A. That is correct.

Q. How long has it been in use?

A. You refer to that printed form?

Q. Well, the one that I have here is print date 1947, so it has been used since that time, I assume?

A. It has been a mimeographed form even prior to that.

Q. What instructions are given to your merchandisers as to what action is to be taken with respect to an operator who fails to comply with the various instructions which we have just reviewed?

A. The merchandiser is instructed to exercise a great deal of patience with the operators under his supervision in respect to their conformity with all of these standard practices and policies, to make quite certain that the deviation is not due to the fact that he has failed to get his training over or has failed to make it clear and certain that this condition, whatever exists which is in disfavor or is disapproved of, to give the operator every opportunity to correct whatever deficiencies exist, and then as a last resort, and only as a last resort, to tell the man he will just simply have to terminate his lease.

Q. Is he told why, and that is to say, the reasons pursuant [fol. 3011] to which he should recommend that an L-O operator be displaced? That is, what are some of the circumstances of justifications in accordance with your instructions that would impel a merchandiser to recommend the displacement of an L-O operator?

A. The merchandiser is instructed that examples of action or negligence on the part of the operator which would warrant a termination of his lease would be such things as operating with very limited operating hours, the failure to have a sufficient crew on the station to enable him to further increase the volume, to the absence of his ability to maintain a proper inventory of merchandise, the keep-

ing a filthy and disorganized station, negligence on his part which might result in damage to the property, the attempt on the part of the operator to engage in what we might call absentee operation, in other words, to try and keep the station in name and go out and, let us say, take another competitive station or take employment somewhere else. Those are a number of instances.

Q. Taking the case of a station which we are losing, for instance, by reason of the termination of the lease or a street change or something of that nature, what is Richfield's policy and practice as outlined by your instructions relative to the petroleum products and approved merchandise and equipment of the operator of that station?

[fol. 3012] A. In the event we lost the station for one reason or another, the merchandising representative is instructed to first permit—to instruct that operator to permit the inventory to run down. Any remaining petroleum products on hand as of the final closing date are returned to stock and the operator issued credit for it. The TBA merchandise which is on hand is either—the first step is to dispose of it to other operators or to any other dealers, our own or anyone's else who might care to buy it, especially broken packages. What is still left there then, quite frequently the TBA distributor will take it back, that is, providing it is approved merchandise. And so far as the equipment is concerned, in most cases we will either help him dispose of it at a fair price or, if we are unable to do that, we will buy it ourselves. In other words, we do not close the station and leave the operator high and dry, providing he has conformed to policy. If he has taken a lot of unauthorized merchandise or super de luxe equipment which we did not advise him to buy in the first place, why, that is his tough luck and not ours. But if he has conformed to our instructions and policy, he is able to close out the business and cash in completely.

Q. In an effort to cut this short, Mr. Dusto, and obviate the necessity of repeating your testimony I am going to ask you a few leading questions, if court and counsel will permit me to. Richfield is divided into three operating di-

[fol. 3013] visions, is that correct?

A. That is correct.

Q. And you have an official counterpart in each division, is that correct?

A. That is correct.

Q. And who is that in the other divisions?

A. That is Mr. C. S. Burgner in the southern division and Mr. J. T. Chapman in the northern division.

Q. Is it true that you meet with these men occasionally and with your superiors at which you discuss the policies and practices of your operations?

A. That is correct.

Q. How often do you meet?

A. Twice a year or more.

Q. On the basis of those meetings, you are familiar with the operations generally and can state that the same practices and the policies are prescribed for the operation of the entire company, is that correct?

A. So far as I know, all three divisions operate under the same policy and practice.

Q. So can you state of your own knowledge, as acquired from these meetings, whether Mr. Dusto and Mr. Chapman are told to follow the same general practices and policies and, to the best of your knowledge, they do follow them, is that correct?

[fol. 3014] A. Mr. Burgner and Mr. Chapman. Yes, I think they do.

The Court: All right. Do you want to take a short recess or is your examination going to be brief?

Mr. Dixon: It is going to be rather brief, Judge, I think.

The Court: All right, let us go on. Have you finished?

Mr. DeMartini: Yes, sir.

Cross-examination.

By Mr. Somerville:

Q. Mr. Dusto, you testified concerning the manner that these prospective lessees of leased out stations were obtained. It is a fact, is it not, that some of your leased out operators have formerly operated service stations handling the brand gasoline of some other oil company other than Richfield?

A. That is correct.

Q. And in some instances you select operators who have operated a service station in the general vicinity of the leased out stations which they are to enter, is that correct?

A. That might be possible.

Q. Do you on any occasion receive applicants who are seeking for a 542 lease and come to you concerning the lease?

A. I did not get the first part of that question.

Q. As I understand from your testimony, you described certain means by which you attempted to acquire operators for these stations, such as advertising and having your [fol. 3015] merchandisers make certain contacts. Isn't it true that that works in reverse, that sometimes applicants come to you seeking a station?

A. That is correct.

Q. With regard to the instructions that are given to an incoming operator, you testified that the new operator is instructed to wear uniforms. Who pays for those uniforms?

A. The operator.

Q. Who selects the help at that station in those cases where the lessee is unable to handle all of the business himself?

A. Either the operator will do it himself or he will ask for the assistance of the merchandiser to help him interview some prospective help.

Q. Do you reserve the right to veto any particular employee of his?

A. No, we don't.

The Court: But you reserve the right to tell him if he is to ask for help?

The Witness: That is correct.

By Mr. Somerville:

Q. You supply no financial assistance with respect to paying his help, do you?

A. No, we don't.

Q. With respect to advertising helps, you described some items such as the flower seeds and road maps and these [fol. 3016] other items that are given away to service stations. Do you know, Mr. Dusto, whether those items are

also supplied to the other type of stations, the dealer type of stations?

A. They are supplied to all types of Richfield resale outlets regardless of classification.

Q. Does the leased out operator pay for those items?

A. Not those particular items that I named, no.

Q. Does the dealer type of operator pay for those items?

A. No, he does not pay for them, either.

Q. In other words, they are given on the same basis for all service station operators or dealers?

A. That is correct.

Q. Who pays for the lube charts and the door stickers indicating when a lube job has been performed and when the next performance is due?

A. The lubrication charts are purchased by Richfield and loaned to the L-O operator.

The Court: He does not mean those. He means the stickers that they put on the ledge of the door. Isn't that what you mean?

Mr. Somerville: Yes. I believe I did compound that question, sir, but let us confine it to the little stickers.

The Court: To let you know when the job was done and when the next one is due.

The Witness: Well, the question was compound. The [fol. 3017] chart is one thing and stickers something else.

By Mr. Somerville:

Q. Let us confine it to the stickers. I realize I did it.

A. The operator pays for the stickers.

Q. The dealer pays for it, the operator?

A. The operator, yes, sir.

The Court: Well, the chart, you have got a book.

The Witness: That is right.

The Court: It is a very big book.

The Witness: That is correct.

The Court: And it may have all the standard automobiles.

A. We call it a lubrication guide.

The Court: And then the man is supposed to memorize that thing.

The Witness: He is supposed to refer to it.

The Court: Whenever he is stuck, that is what he studies, isn't it?

The Witness: He is supposed to refer to it.

The Court: To refer to it, that is right.

By Mr. Somerville:

Q. You give the customer a chart that describes the services performed, that is, the operator does?

A. He gives him what we call a job ticket.

Q. And who pays for that?

A. The operator.

[fol. 3018] Q. Do you personally supervise the checking in of new lessees, Mr. Dusto?

A. I haven't done so for quite a while.

Q. You testified that the operator is told generally how much TBA merchandise he is to stock and how much petroleum products he should have on hand. Normally it is a fact, is it not, that the operator pays cash for that merchandise?

A. Normally he would pay cash, yes.

Q. In some instances there have been operators who have started out in entirely new stations during your experience, have they not?

A. That is correct.

Q. In those situations the operator would have to invest a considerable amount of money for an opening stock, would he not?

A. That is correct.

Q. You testified that in some cases these direct shipment loans were given. Do I understand that those were given only for payment of quantity of direct shipments of gasoline, or does that apply also to TBA products?

A. Well, a direct shipment loan, as we term it, is for that exclusive purpose and nothing else.

Q. Does that happen very frequently?

A. Quite frequently.

Q. During the installation of these tanks where the serv-[fol. 3019] ice may be interrupted, in the event the operator has help do you give him any assistance with respect to paying their salaries, other than the possible rental reduction?

A. No, we do not. I might mention—in fact I would like to mention—that these installations are normally made in such a way that they have very little effect on the normal progress of business. We would not deliberately start an installation, for instance, on a Friday and tie the operator up over the week-end. If we had to tear out the old tanks, which we do in most cases, we would not uncouple his old tanks until at least one of the new tanks was in and hooked up. Every precaution is taken to keep the station as nearly as possible on a normal operating level.

Q. On these direct shipments on a full load, at the present time how much would a full load cost to the operator?

A. We have a very few operators that take a full load. By the way, that is truck and trailer. That would be about 7,500 gallons. That would run somewhere between $1,350 and $1,600, depending on the price of the gasoline in that particular area.

Q. In some instances have you instructed leased out operators to take a full load, shipments of full loads?

A. We have about 10 or 12 operators taking full loads at their own preference. The normal requirement is half a load, which is either the truck load or the trailer load, [fol. 3020] which runs about 3,750 gallons. Some of them do considerable volume of business and, naturally, it would have to be to take that much gasoline, take the full loads because of the temperature and correction adjustment that they get on the gasoline.

Q. I understand from your testimony that you direct operators, or, rather, suggest the amount of TBA stock that he should have on hand. Normally what investment is required for the operator to have a complete stock of the items as directed by you?

A. That would vary with the size of the station from a gasoline volume standpoint. On the average, I would say that their entire battery and accessory inventory would possibly run from $1,200 to $1,500.

Q. You testified that the lessee-operator is given some training. Would you tell the court whether that training occurs after he enters the occupancy of the station or before?

A. It could occur either before or after or both. Quite frequently, when the prospective operator has never been in the service station business, has been in some other type

of business, he will be placed with one of our better operators and might work for him a week or 10 days or two weeks to learn to get the feel of things. He would work there under the direction of our merchandising representative who would use this other operator's station as a place [fol. 3021] for doing the training and where the man could see in action some of the practices and procedures that we had previously talked to him about.

Q. Is the man paid a salary by you during that training period?

A. No, he is not.

Q. With respect to Defendant's Exhibit V, which is the dealer training guide and the dealer's TBA manual, when did you say that particular guide and manual went into effect?

A. It went into general effect in 1946 or '47 as a printed form, I believe, and prior to that it was in its more or less—we were just in the process of putting it together.

Q. With respect to the termination of any particular lessee-operator under the 24-hour clause do you have the final decision as to whether that operator shall be replaced?

A. So far as the division is concerned, I do not.

Q. Who would have that authority?

A. The division manager.

Mr. Somerville: That will be all, Mr. Dusto.

Mr. DeMartini: That is all.

The Court: One question, Mr. Dusto. In giving the list of faults or sins, shall we call them, for which termination might be made, I notice you did not refer to the failure to observe the rule in regard to carrying non-approved items [fol. 3022] of TBA.

The Witness: I just happened to overlook that, your Honor.

The Court: What?

The Witness: I just overlooked that.

The Court: That is the top of the list of sins, isn't it?

The Witness: And I do not believe I mentioned petroleum products, either.

The Court: I see. All right. Well, I just wanted to know and be sure if that is in the proper perspective, you know, because that seems to have been stressed by every other wit-

ness and I have noticed in giving the list you omitted that. All right. Anything further from this witness?

Mr. Somerville: No, your Honor.

The Court: All right, step down. Take a short recess, gentlemen.

(Short recess.)

[fol. 3023] Mr. Paradise: Mr. Knudson, please.

JOHN E. KNUDSON, called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Court: State your name, please.

The Witness: John E. Knudson, K-n-u-d-s-o-n.

By Mr. Paradise:

Q. What is your occupation, Mr. Knudson?

A. Present occupation is personnel supervisor for Richfield's Northern Division.

Q. Prior to your present occupation as personnel supervisor in the Northern Division, were you a merchandiser for Richfield?

A. Yes, sir, I was, for approximately five years.

Q. During what period?

A. For approximately five years.

Q. Were you a merchandiser during the period from 1946 to 1947?

A. Yes, sir, I was.

Q. Are you acquainted with a Mr. Robert DeLonge?

A. I am.

Q. Were you acquainted with Mr. DeLonge at the time he [fol. 3024] occupied a Richfield L-O station, during the period, I believe he testified, from October 29, 1946 to September 29, 1947?

A. From the time approximately a month after he went into the station to the time when he left the station, yes.

Q. How often did you see or talk to Mr. DeLonge during the period that he was in the station?

A. At least once a month.

Q. That is, I think you testified, commencing about a month after he moved in?

A. That's right.

Q. Was Mr. DeLonge's operation of the station satisfactory?

A. Mr. DeLonge, in my opinion, was a very good service station operator.

Q. Did he conduct any other business in connection with the operation of his service station?

A. Yes, he did, in the back part of the particular service station that he occupied, he conducted a garage repair or replacement parts service.

Mr. Hall: I can't hear you very well, Mr. Knudson.

The Witness: He conducted a garage repair business.

By Mr. Paradise:

Q. Did you ever complain about his conduct of that subordinate business, or of that additional business?

A. No, I didn't, because Mr. DeLonge worked himself [fol. 3025] primarily in the service station end of the business, and had his mechanics doing the work in the back.

Q. Mr. DeLonge has testified in this case and stated that he left the station on or about September 29, 1947. Did you have any discussions with Mr. DeLonge prior to that date, concerning Mr. DeLonge's desire to leave the station?

A. Yes, I did. Sometime in August, I believe, Mr. DeLonge told me that he thought he would like to leave the station, and I attempted to explain to Mr. DeLonge that we would appreciate his staying, if he could see fit to do so.

Q. Was there any discussion at that time concerning the finding of a new operator for the station, by either you or Mr. DeLonge?

A. Well, during that discussion it was understood by me that he and I——

Q. I am calling for conversations, Mr. Knudson.

A. I understand. Well, I advised Mr. DeLonge, when he expressed the desire and made it definite that he wanted to get out, that I would attempt to find another successor operator to Mr. DeLonge as soon as possible.

Q. Did Mr. DeLonge also mention that he was going to look for a successor?

A. He also mentioned he would keep on the lookout for someone. However, he never did run across anybody.

Q. At that time was there any discussion as to what the [fol. 3026] successor operator would purchase by way of petroleum products or other merchandise?

A. I explained to Mr. DeLonge that we would assure him that the approved Richfield TBA products and approved Richfield equipment, service station equipment, and petroleum products would be sold to the successor at the depreciated value and the correct wholesale value at that time, whenever it was to be, and that as far as the garage repair equipment and merchandise along that line, that we could not guarantee any sale, that it would depend on the individual.

Q. Have you ever met a man named DeHoag?

A. Yes, I have.

Q. Will you state under what circumstances you met him, and where?

A. A commission agent at Olympia, Mr. Kisor, at that time made an appointment for me to interview Mr. DeHoag with a view of his leasing the service station.

Q. When did that occur in relation to the time when Mr. DeLonge moved out of that station?

A. That would be approximately a week before that date.

Q. What discussions did you have with Mr. DeHoag on that occasion?

Mr. Hall: Just a minute. Your Honor, I object to any discussion between this man and Mr. DeHoag, who is not a party to this suit, and that is not binding.

[fol. 3027] The Court: But there is testimony regarding him and the difficulties in the record.

Mr. Hall: In the presence, I believe, of Richfield.

The Court: Overruled.

By Mr. Paradise:

Q. What conversation did you have with Mr. DeHoag on this occasion, one week before Mr. DeLonge moved out?

A. In talking with Mr. DeHoag, I asked the background

of the sort of business he was doing, and his business experience.

Q. I can't hear you, Mr. Knudson.

A. I asked his past business experience, and he advised me that he at that time was in the process or had sold out or was selling out a radiator repair shop in Portland, Oregon, and that he felt Olympia was in need of a radiator repair shop, and that it would be a good business for him to go into, and his idea would be to set up his radiator repair shop in our service station, in the back end.

Q. Following that conversation did you have any discussion with Mr. DeLonge concerning Mr. DeHoag?

A. One or two days before the actual——

Q. Just answer my question, Mr. Knudson.

A. Yes, I did.

Q. When did that conversation occur?

A. About one or two days before the actual check-out.

[fol. 3028] Q. When you speak about the check-out, are you speaking of the day Mr. DeLonge left?

A. The day Mr. DeLonge left, that's right.

Q. What conversation occurred?

A. I advised Mr. DeLonge that Mr. Kisor and myself had decided not to lease the service station to DeHoag, and that we had picked a Mr. Winters to be the successor to the lease.

Q. Was there any discussion as to Richfield's reasons for its decision in not leasing this station to Mr. DeHoag?

A. Yes. I explained to Mr. DeLonge that Mr. DeHoag had planned, and his primary purpose in getting the service station, in our opinion, was to operate this radiator repair shop, which it seemed to us would be detrimental to the operation of the service station, and that the service station would, in his operation, be a sideline rather than the main business, and we felt that our business would suffer because of it, whereas the other man that we picked, Mr. Stanley Winters, had been a service station operator and wanted to operate only the service station end of the business.

Q. Did Mr. DeLonge make any complaint about that at that time?

A. He objected to the point that Mr. DeHoag, of course, would have purchased all of his garage equipment, whereas [fol. 3029] Mr. Winters was not going to purchase it. But

he said, "If that's the way you want it, that's the way it will be."

Q. Now, calling your attention to the date on which Mr. DeLonge left the station, who all were present on that day, and will you state, in brief summary, what occurred.

A. The first thing in the morning, upon our arriving there, I think it was about 9:00 o'clock in the morning,——

Mr. Hall: What was that?

Mr. Paradise: The date on which Mr. DeLonge left the station. Would you start over again, Mr. Knudson?

The Witness: Yes. Upon arriving there, at approximately 9:00 o'clock in the morning, Mr. Dinsmore, another Richfield representative, was with me, Mr. Winters was there, the prospective purchaser we had chosen to lease the station, Mr. DeHoag, and a Mr. Baker were there, and Mr. DeLonge, and Mr. DeLonge's employees.

By Mr. Paradise:

Q. And what occurred?

A. Well, shortly afterward, Mr. DeHoag came to me and stated again, after I had previously told him that we would not lease the station to him, if we would reconsider and lease it to him. And I told him, no, that we were leasing it to Mr. Winters.

Then shortly after, I presented the 306 termination to Mr. DeLonge for terminating his lease, and he glanced over it rapidly and said that he would like to show it to his attorney [fol. 3030] before he signed it.

I said, "Well, in that case, we can go ahead with the inventory," which he agreed to and Mr. Winters agreed to. Mr. Dinsmore left at that time and did not come back until late that night. Then we began the process of taking the inventory.

Q. When you are talking about the inventory—inventory of what?

A. Of the merchandise, TBA products, pertaining to the service station, and only the Richfield approved products were listed on the actual inventory, and then, of course, they were later priced as to the correct wholesale price at that time. Then also the equipment inventory of the normal

service station equipment, and the depreciated value was set.

Q. Did Mr. Winters buy all of the Richfield petroleum products at the station?

A. Yes, he did.

Q. Did Mr. Winters buy all of the approved TBA in the station?

A. Yes, he did.

Q. Did Mr. Winters buy from Mr. DeLonge all of the approved service station equipment——

A. Yes, he did.

Q. —that Mr. DeLonge was willing to sell?

A. That's right.

[fol. 3031] Q. Was there any non-petroleum products which Mr. Winters did not buy?

A. There was some there which he did not buy.

Q. Do you recall the approximate value of that?

A. Of the petroleum products?

Q. Of the non-Richfield petroleum products.

A. Non-approved. I don't believe the value would be in excess of $50.

Q. Were there any non-approved TBA present at the station?

A. Yes, there was some.

Q. Did Mr. Winters buy that?

A. No.

Q. What was the approximate value of that?

A. Well, roughly, between three and five hundred dollars, not to exceed $500.

Q. Mr. DeLonge testified he had an offer from Mr. DeHoag to buy out his complete inventory of petroleum products and TBA, and tools and equipment for approximately $5400. Were you aware of that?

A. That was my understanding at the time.

Q. Do you know the approximate purchase price of the products and inventory which Mr. Winters bought from Mr. DeLonge?

A. I believe it was around $1600.

[fol. 3032] Q. What did the difference between the $5400 and the $1600 represent.

A. The biggest difference was DeLonge's garage repair equipment, which would include brake relining machines,

hydraulic jacks, a steam-cleaning machine, and equipment of that nature, which is used in the garage repair business and not in service stations; also, merchandise and stock, and those repair parts used in that business, and some of this non-approved TBA.

Q. I have forgotten whether I asked this. What in the aggregate was the total of the non-Richfield petroleum products and non-approved TBA which Mr. Winters failed to buy from Mr. DeLonge?

A. I am sure it would not be over $550.

Q. In the aggregate?

A. That is the non-approved TBA and petroleum products.

The Court: Had anyone ever inspected the place to see that he was putting in this expensive equipment?

The Witness: I believe that equipment had been there for quite some time. It had been there all the time I had been calling on him. Actually I think he purchased it from the former operator.

The Court: In other words, he evidently assumed that that equipment, at least, would be taken in when any change would be made?

[fol. 3033] The Witness: He may have, but he wanted to —I mean, he used the equipment in his type of operation. That is, he wanted to do the garage repair, as well as the service station, whereas this man Winters did not and he had no need for that equipment or merchandise at all.

The Court: But when DeLonge went in there, it was there, and Richfield supervised that change?

The Witness: Yes, your Honor. But, you understand, he wanted the equipment. I mean, he was planning and intending to do that type of work, and at that time much of that equipment was scarce, and so people could ask almost any price they wanted, whether they sold it to the operator, or to anyone outside.

The Court: The point I am asking on is why, if Richfield had such control over what goods were sold, why did Richfield allow him to buy four or five thousand dollars worth of equipment, and then put in a man who didn't want it?

The Witness: Of course, I wasn't there at the time, but I presume it was because DeLonge was going to operate the

station himself and hire mechanics to run the back end. In other words, the service station was his primary business, whereas the garage was a sideline. Actually, he had one or two mechanics, depending on the amount of work, who worked on a commission basis.

The Court: I see. All right.

[fol. 3034] By Mr. Paradise:

Q. The bulk of this equipment you are talking about was the garage equipment; is that correct?

A. That's right.

Q. Mr. DeLonge testified, when he was a witness in this case, that he was told by Mr. Dinsmore on the morning of this check-out, and he said about a half an hour after the termination lease was offered, that he was told, "to be out of here by 8:00 o'clock in the morning and take all that trash with you." Were you present during all of these conversations?

A. I was present all the time from the time we originally arrived until approximately 3:00 o'clock in the afternoon.

Q. Will you state what occurred, by way of conversation or anything else, with respect to the time that Mr. DeLonge was either asked to leave the station, or when a change of operation was discussed, and things of that nature?

A. Yes. There was no mention of any time made as to when the operation would change until the inventory was completed; that is, completed as to pricing and the actual value of the merchandise and equipment was fixed at which Winters was going to buy, which would have been about 2:00 to 3:00 o'clock in the afternoon.

Q. During the time Mr. Dinsmore was in the station did he make any statement such as Mr. DeLonge stated?

A. Mr. Dinsmore never made any such statement.

[fol. 3035] Mr. Paradise: Complete your answer.

A. While I was there.

Q. Were you there at all times on that day with Mr. Dinsmore?

A. I was there at all times.

The Court: Regardless of what he said, he made short shrift of the operation. You got him out of there in a few hours, isn't that true?

The Witness: No, sir. Left the station approximately 3:00 o'clock in the afternoon, and at that time Winters, DeLonge and myself discussed when would DeLonge discontinue the operation and Winters begin, and it was decided that if Winters could arrange his night shift—you understand the station was open 24 hours.

The Court: Yes.

The Witness: If he could get a night man to begin work at midnight, that was when the break would take place.

The Court: All right. I still say that is making short shrift in ending an operation and putting another man in.

The Witness: We very seldom take over a day, sir, to make a change of dealers.

The Court: I know that.

By Mr. Paradise:

Q. Was there any discussion, Mr. Knudsen, on the subject matter of whether or when Mr. DeLonge should remove from the premises any of the items that Mr. Winters did [fol. 3036] not buy?

A. Toward the end of the inventory or the latter part of the inventory, at least, Mr. DeLonge, as we or Winters told him he did not want certain items of merchandise, he began to remove it from the shelves and put it in boxes and put it out beside the rear part of the station. And I remember distinctly on two different times that I told DeLonge that he didn't have to do that right now, that that could wait and he could take his time in getting it out. No one ever told him that he had to remove it right away or by 8:00 o'clock in the morning or by any particular time. He could take two or three days, as much time as he needed to remove all of his equipment that he was going to take with him.

Q. Was there any discussion concerning the time when he would or should remove the repair tools and equipment from the garage?

A. No, sir, there was not, other than the fact that he could take two or three days or as much time as he needed.

Mr. Paradise: No further questions.

The Court: He evidently did not understand it that way. All right, go ahead.

Cross-examination.

By Mr. Hall:

Q. Mr. Knudsen, can you describe briefly the physical aspects of this so-called service station? Is it like most of [fol. 3037] the service stations placed by itself on one plot of ground, all alone as an automotive service station?

A. It is a rather peculiar type of station. It is not like any of our normal service stations. It covers a large area and has a roof over the entire area, where some of our stations have open lots. This has a roof over the whole premises.

Q. Are there any other businesses in operation in this particular building occupied by the station?

A. There were not at that time.

Q. And does the lease cover the entire premises which you have described?

A. Yes, it does.

Q. And the property, roughly speaking, would encompass somewhere between a quarter and a half a block or more, wouldn't it, or the main part of that one corner on the corner of Fourth?

A. That is true?

Q. That is true. And I believe you stated that the premises that were used by Mr. DeLonge as a repair shop or something like that had been used previously for a repair shop before he went in there?

A. I really don't know. I wasn't in the territory before Mr. DeLonge was in there.

Q. You don't know what it was used for before about [fol. 3038] a month after he came in, is that right?

A. Well, it had been used as a service station. As far as the back part, I don't know.

Q. You were introduced to Mr. Winters by Kisor, is that true?

A. No, that is not true. I met Mr. Winters on my own.

Q. Hadn't Mr. Kisor known Mr. Winters for some time?

A. He knew of him, yes, sir. Whether he actually knew him or not I don't know. Mr. Kisor referred me to Mr. Winters.

Q. Mr. Kisor referred you to Mr. Winters?

A. Yes, that is true.

Q. What is what I wanted to know. Do you know or do you remember hearing Mr. Kisor state to Mr. DeLonge that he had had Winters in mind for that station for over eight months?

A. Mr. Kisor told me in——

Q. Just answer that question.

A. Will you ask it again?

Q. I asked you if you heard Mr. Kisor tell Mr. DeLonge that?

A. I didn't hear him tell him that, no.

Mr. Hall: I don't believe there is anything further from this witness, your Honor?

The Court: All right. Any redirect?

Mr. Paradise: No further questions.

[fol. 3039] Mr. Hall: I would like to in connection with this introduce or have marked for identification——

Mr. Paradise: Mr. Knudsen, will you wait for just a moment, please?

Mr. Hall: Just a moment, Mr. Knudsen.

Mr. Dixon: It is 20A, Mr. Childress.

The Clerk: Government's Exhibit 20-A marked for identification.

(The document referred to was marked Plaintiff's Exhibit 20-A for identification.)

The Court: All right, take the stand.

Mr. Hall: I don't think it will need Mr. Knudsen.

The Court: Just one question. You said that you talked about running a repair shop, a radio repair shop?

The Witness: Radiator repair shop.

The Court: Where were they going to run it?

The Witness: In the back of our service station building.

The Court: I thought that was occupied by the repair shop for the automobiles?

The Witness: At one corner there was a wash rack for washing cars.

The Court: Yes.

The Witness: And he intended to put it in that place.

The Court: Did he tell the man he wanted to sell it to or you to transfer it to he would continue that? Is that what [fol. 3040] he told you?

The Witness: I didn't understand you.

The Court: Didn't you say he had somebody in contemplation?

The Witness: Oh, DeHoag told me that.

The Court: Yes.

The Witness: This was Mr. DeHoag that was going to run the radiator repair shop, not DeLonge. Delonge was running the garage. DeHoag was going to run the garage part of it as well as the radiator repair shop.

The Court: DeHoag had been picked by you as the classical operator of the service station?

The Witness: He was sent to us by Mr. DeLonge.

The Court: That is right. And you had Winters instead?

The Witness: That is right.

By Mr. Hall:

Q. Mr. Knudsen, who was H. C. Buck?

A. At that time H. C. Buck was the assistant division manager in charge of merchandising.

Mr. Hall: That is all, thank you. Your Honor, the Government will offer into evidence Government's Exhibit No. 20-A.

The Court: All right, it may be received.

The Clerk: 20-A in evidence.

(The document referred to was marked Plaintiff's Exhibit 20-A and received in evidence.)

[fol. 3041] Howard J. Brower, called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Howard J. Brower.

Direct examination.

By Mr. DeMartini:

Q. Will you state your name and address?

A. Howard J. Brower, 1925 East Glenoaks Boulevard, Glendale.

Q. By whom are you employed, Mr. Brower?

A. Richfield Oil Corporation.

Q. And what is the nature of that employment?

A. I am manager of the real estate and land department of the marketing division.

Q. How long have you had that department?

A. Since March of 1937.

Q. What are your duties as such manager of the real estate department?

A. Well, I handle all marketing problems relating to real estate. I administer all fee owned or leased service station or bulk plant properties. I supervise the records, payments of the rentals and taxes, and I supervise the acquisition of new locations both by lease and purchase, that is, service station and bulk plant locations. I direct the operations of [fol. 3042] the division real estate personnel in their program of acquisition of new service stations and bulk plant sites, and in the renewing of leases. Our operations are handled through three divisions. Each has its own division or division real estate manager and staff. It is the duty of these people to originate all propositions relative to the acquisition of new service stations and bulk plants, the renewal of expiring leases, and the sale of inactive fee properties. These people are in direct contact with our lessors in the field on any matters pertaining to our tenancy and their properties. The proposals originating in the division are then routed to the home office real estate and land department through the division manager.

I direct the operations of the division real estate personnel in the sale of inactive fee properties, analyze the proposals from the divisions relative to purchase, lease, sublease, sale or improvement, that is, the improving of any locations, either approve or disapproving these proposals, subject to final approval or rejection of the vice-president, Mr. King.

Q. Are you familiar as to what is referred as to the leased out or L-O station as your marketing department uses it?

A. Yes. I would say that an L-O station is one acquired by Richfield through purchase or lease as an outlet for Rich- [fol. 3043] field products, that that is separate and distinct

from the 3-C proposition when the lessor is also our lessee and dealer.

Q. In other words, you do not refer to the 3-C as an L-O station?

A. No.

Q. Insofar as the Richfield's ownership or interest is involved in the L-O type of stations, will you describe the several categories into which they fall?

A. Well, in order to segregate them we have used the classifications A, B, C, and D. By A we mean a fee owned service station. B is where we own the improvements on leased land. C is where we lease the improvements and the land, and in this case we call those the lessor built type where the improvements were constructed along the lines of plans and specifications furnished by Richfield. The D classification is also one in which we lease both land and improvements, but unlike the C classification, these improvements were not constructed to Richfield's plans and specifications.

The Clerk: Defendant's Exhibit W marked for identification.

(The document referred to was marked Defendant's Exhibit W for identification.)

By Mr. DeMartini:

Q. I will show you an instrument marked Defendant's [fol. 3044] Exhibit W for identification, entitled "Compilation of Total Number of Richfield's L-O Stations Showing Portion and Percentage Thereof Originally Created as Service Stations by Richfield as of December 31, 1950" and ask you if you know what this compilation represents?

A. Yes. This refers to L-O service stations and segregates those created by Richfield as opposed to those not so created.

Q. What do you mean by the term "created by Richfield"?

A. This refers to the stations built by Richfield or by the property owner under agreement with Richfield on sites which had never theretofore been used or occupied as a service station handling any petroleum products.

Q. Will you state the manner in which this compilation was prepared?

A. Well, first, cards were prepared, individual cards, segregating the L-O stations into the four categories A, B, C, and D. On these cards was listed the service station number and the address, etc. I then personally checked the marketing department files and the contract and lease files on each individual service station. By this check and by perusing the questionnaire and survey and the correspondence or photographs contained in these files, I was able to refresh my memory as to previous knowledge I had of locations, and if I found that the service station had been built by Richfield or built for Richfield through agreement with [fol. 3045] the lessor on a location which theretofore had never been used as a service station or for the sale of petroleum products, I classified that location as "created by Richfield," and so identified it on the card by marking an "R" in the corner. Those that I found were not created by Richfield I marked with the letter "N".

There were some instances, naturally, that I was not able to find in the files complete identification as to the creation, and invariably in those cases where I was not absolutely sure I classified them as not created by Richfield. This compilation was all done by me or at my direction.

Q. And as a result of that compilation you show of the total of all of the four classifications that 81.3 per cent, or 1,092 stations of a total of 1,343 in existence as of December 13, 1950, were created by Richfield in accordance with this definition?

A. That is right.

Mr. DeMartini: I offer this into evidence, your Honor.
Mr. Dixon: Objected to as irrelevant and immaterial.
The Court: Overruled.
The Clerk: W in evidence.

(The document referred to was marked defendant's Exhibit W and received in evidence.)

By Mr. DeMartini:

Q. Will you state briefly, Mr. Brower, your experience [fol. 3046] in connection with the sale, purchasing and leas-

ing of real estate in the States of California, Oregon, Washington, Arizona, Nevada, and Idaho? I think I got them all in there.

A. Our western market.

Q. In particular with respect to gasoline service station properties, that is, your experience in leasing those properties?

A. You mean prior to my being with Richfield, my experience?

Q. In carrying it through.

A. Well, from 1926 to 1932 I was connected with the Wales-Smith Company, which later became the S. I. Wales Company, realtors dealing primarily in business properties. The firm was very closely connected with the Doheny interests and for that reason we had quite a bit to do with the operations of the Pan-American Service Stations. While we dealt primarily in business properties, right from the start my forte was service stations. I seemed to start out on those and stayed with them all through the years. During that time the company I was with purchased for major oil companies in excess of 50 service station properties and, of course, in weeding out 50 properties we examined and appraised and analyzed hundreds of pieces. Also through my experience with this company we made many appraisals for major oil companies. We were called on continuously for appraisals.

[fol. 3047] In 1931—it was then the S. I. Wales Company—Mr. Wales was appointed by the receiver of the Richfield Oil Corporation and by Stone-Webster Company to make the appraisal on all the marketing properties of Richfield, and it fell upon me to make most of these appraisals from Canada to Mexico. At the completion of that chore in 1932 I was then offered the position I now hold. Having been through the receivership and then through the new company until the present date, I have had occasion to analyze thousands of pieces of property that have been submitted to the corporation and the receivership prior to that for lease and sale and have, naturally, on these occasions have had many appraisals to make.

Q. Is it a true statement that you have been in charge of all marketing of real estate properties for Richfield Oil Corporation since its inception in March of 1937?

A. Yes.

Q. Mr. Brower, are you familiar with the usual manner in which service station leases prescribe the method of computing and paying rentals thereunder? I am referring to a complete service station leased for a long term basis, without any restriction as to products to be sold on the premises, that is, strictly a lease of a service station without any operational limitation attached?

A. Yes.

[fol. 3048] Mr. Dixon: May the record show, your Honor, a continuing objection to this line of questioning on the grounds of irrelevance and immateriality?

The Court: I gathered this was preliminary to something. I cannot see the materiality of the testimony that would come as yet. I am waiting to see. Overruled.

By Mr. DeMartini:

Q. Will you state what the manner of fixing rentals in such leases is?

A. Do you mean——

Q. What is the usual method prescribed for fixing rentals in a service station lease of the type which I have described?

A. Well, there are two manners. One is a gallonage rental with a minimum monthly guarantee, and another one would be a flat monthly rental without the gallonage overriding clause.

Q. Where there is a gallonage rental is it usual to also have a guarantee minimum, you state?

A. Yes, more often than not.

Q. On the basis of your experience and knowledge that you just outlined, are you familiar with the lowest fair rental values of such service station properties in the States which I mentioned during the period from 1946 to date as expressed in cents per gallon?

A. I believe I am.

[fol. 3049] Q. What is that?

A. One and one-half cents per gallon for a fully equipped service station.

Q. Will you state whether under present conditions, and with your knowledge as an expert, whether the tendency is

for that gallonage rental to increase or decrease as of this date?

A. Well, as of this date the tendency would be upward, if anything. In fact, there are many indications that our contemporary major oil companies are paying as high as two cents a gallon for this type of unit.

Q. Is it also true that service stations, or leases of property for service station purposes are sometimes on a bare land basis?

A. That is right.

Q. And there is a gallonage rental involved?

A. You mean where possibly we would lease a piece of land and own the station on it, but just lease the land?

Q. No, where you lease a piece of unimproved land.

A. Oh, yes; yes.

Q. And are those lands sometimes leased on a gallonage basis?

A. Oh, yes. In most cases, I would say.

Q. What, in your opinion, is the going market value on a gallonage basis of the lease of bare land for service station [fol. 3050] property?

A. Well, I would say the going price on the market in this marketing area is one cent per gallon on that type of location.

Q. Now, with respect to those leases that have a minimum guaranteed rent, and also a gallonage rental, is it correct to say that the minimum that would be payable under those leases when computed on a gallonage basis would be the gallonage basis specified in the lease?

A. Yes.

Mr. DeMartini: I think that is all.

The Court: Any questions?

Mr. Somerville: No questions.

The Court: All right. Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. DeMartini: Mr. Semple, will you please take the stand?

[fol. 3051] EDWIN M. SEMPLE, JR., called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination:

The Clerk: What is your name, please?
The Witness: Edwin M. Semple, Jr.
The Clerk: How do you spell your last name?
The Witness: S-e-m-p-l-e.

By Mr. DeMartini:

Q. Where do you reside, Mr. Semple?
A. 14465 Rose Avenue, Los Angeles.
Q. What is your present occupation?
A. I am supervisor of statistics in the Marketing Department, Richfield Oil.

Mr. DeMartini: Will you mark this, please?
The Clerk: Defendant's Exhibit X, marked for identification.

(The document referred to was marked Defendant's Exhibit X, for identification.)

By Mr. DeMartini:

Q. Mr. Semple, I will show you an instrument marked Defendant's Exhibit X, for identification, and ask you whether you caused to have that instrument prepared.
A. Yes, I did.
[fol. 3052] Q. Will you state, first, what the instrument is?
A. The instrument is a comparison of the number of independent resale, 337 resale, accounts lost during the period January 1, 1946 to and including December 31, 1950.
Q. Now, referring to the three columns, the three main headings, what do they represent?
A. Well, the compilation is further segregated between the number of accounts that were lost at expiration, the number of accounts that were lost prior to the time of the expiration of the contract, and then the total number lost, and those three categories further broken down as to

whether or not the accounts in question had a painting agreement in effect at the time the account was lost.

Q. These columns are totaled at the bottom, and which show in the instance of the number lost at the expiration of the contract, in which a painting agreement was in existence at the time of loss the figures, and then "Yes" and "No" represent what?

A. That represents the existence of a painting agreement at the time the account was lost. "Yes" indicating that there was one in effect. "No" indicating there was not one in effect.

Q. So that of the total number lost at the expiration of the contract, namely, 107, 26 did not have a painting contract in effect, and 81 did have a painting agreement in [fol. 3053] effect?

A. That's right.

Q. Then the second column represents what?

A. That represents the number of accounts lost prior to the normal expiration of the contract.

Q. And that again is segregated into those that had painting agreements in effect at the time of the loss, and those which did not have painting agreements at the time of the loss?

A. That is correct.

Q. And those which represent a total of 407 are segregated into 303, which represent those which had a painting agreement in effect at the time of loss, and 104, which did not have a painting agreement in effect at the time of loss?

A. That is correct.

Q. Summarizing the aforesaid, the total number lost was 514, and of those 130 did not have painting agreements in effect at the time of loss and 384 did have painting agreements in effect at the time of loss?

A. That is correct.

Mr. DeMartini: The defendant offers this in evidence.

Mr. Dixon: It is objected to, your Honor, as irrelevant and immaterial, and particularly,——

The Court: It may be received.

Mr. Dixon: All right, your Honor.

[fol. 3054] The Clerk: Defendant's Exhibit X in evidence.

(The document, heretofore marked Defendant's Exhibit X, for identification, was received in evidence.)

Mr. DeMartini: That is all.

The Court: Any questions?

Mr. Dixon: Yes, your Honor.

Cross examination.

By Mr. Dixon:

Q. Mr. Semple, you referred to statistics here as expressing the number lost. What do you mean "lost"? Do you mean that when the sales contract 337 expired that it was either not renewed by you or the other party to the contract, that is, by Richfield or the other party to the contract?

A. Well, by "accounts lost" I refer to the fact that they discontinued purchasing Richfield products.

Q. Well, when?

A. At a time during the normal term of the contract or at the normal expiration of the contract.

Q. In other words, these statistics merely relate to those contracts which terminated through the natural expiration of the term; is that right?

A. No, sir.

Q. Or then they were terminated by the action of either [fol. 3055] Richfield or of the other party to the contract, the dealer; is that correct?

A. That's correct.

Q. Do you know how many of these so-called lost accounts were terminated by Richfield?

A. No, I do not.

Q. Did you try to figure how many of them were terminated by Richfield, in compiling these statistics?

A. No.

Q. Do you know how many of them were canceled by the dealer?

A. No, that follows, because it would be the balance of the accounts lost.

Q. You have made an effort in compiling these statistics to show how many of these so-called lost accounts were

terminated by the dealers prior to the normal expiration date of the contract; is that correct?

A. That is correct.

Mr. Dixon: I renew my objection, your Honor.

The Court: All right. I will renew the ruling.

Mr. Dixon: A very effective cross examination.

The Court: All right.

Mr. Paradise: Mr. Will.

Mr. Dixon: May I call this witness back for one question, Judge?

[fol. 3056] The Court: Yes. Ask him from there. You may stand there.

By Mr. Dixon:

Q. Do you know how many of these painting agreements Richfield collected on, Mr. Semple?

Mr. DeMartini: I object to that as not proper cross examination.

The Court: What was that?

Mr. Dixon: How many of the painting agreements that are referred to in this Exhibit X were collected on by Richfield, that is to say, that Richfield collected from the dealer?

The Witness: No, I do not know.

Mr. Dixon: You don't know that?

The Witness: No.

Mr. Dixon: That is all.

The Court: All right.

(Witness excused.)

[fol. 3057] David Will, called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?

The Witness: David Will, W-i-l-l.

By Mr. Paradise:

Q. Mr. Will, in what capacity have you been employed by Richfield Oil Corporation?

A. Manager of contract-lease department.

Q. Are you familiar with the forms of contracts known as the 3-C and the 337 contracts?

A. I am.

Mr. Paradise: Will you mark, this, please?

The Clerk: Defendant's Exhibit Y, marked for identification.

(The document referred to was marked Defendant's Exhibit Y, for identification.)

Mr. Paradise: I have a copy of this for your Honor.

The Court: Is that another form?

Mr. Paradise: This is an additional compilation, which we think is material.

The Court: All right.

By Mr. Paradise:

Q. Mr. Will, I will show you Defendant's Exhibit Y, for [fol. 3058] identification, which is entitled "Compilation of 337 and 3-C Contracts In Effect As of February 28, 1951," and ask if that was prepared by you or under your supervision and direction?

A. It was.

Q. Will you state what it represents, first?

A. I personally supervised the compilation——

Q. Not how it was prepared. We will come to that later. What does the compilation represent?

A. It is a compilation of 337 and 3-C contracts in effect as of February 28, 1951, segregating such contracts into four groups. Each such group, A to D, inclusive, describes the ratio which the minimum quantity of gasoline, the quantity that the dealer obligates himself to purchase, specified in the dealer's sales contract bears to the dealer's average monthly purchases for the year preceding the date of the contract. Where such average monthly purchasers were not available at the time the contract was written, the ratios were computed on the basis of the estimated gallonage.

Q. In what manner was this compilation prepared?

A. I supervised the compilation of the forms designed for the purpose of computing percentagewise, speaking of

the ratio, that the minimum gasoline quantity in the contract bears to the average past purchases of the location. Where these figures were not available, it was based on the estimate of what the dealer himself or our representa-
[fol. 3059] tive felt the station would do.

Q. That estimate was an estimate made at or before the date the contract was made; is that correct?

A. That is correct.

Q. And that estimate was contained in the file?

A. Right.

Q. Now, calling your attention to these items on this form where it says, "Group A—Less Than 75%" and opposite that is the number 408 in column 2, will you state, so that it will be more explanatory, what does that precise figure 408 refer to?

A. It is the number of 337 and 3-C sales contracts in effect as of that date, where the minimum gasoline figure was less than 75 per cent of the average past purchases by the account, if such records were available. If it was a new location, it would be less than 75 per cent of the account's estimate of what the account would do or our representative's estimate of what the account would do.

Q. When you refer to the minimum figure, are you referring to the figure under the word "minimum" in the 337 form of sales contract?

A. I am; the quantity which the dealer obligates himself to purchase.

Q. And is that the same figure also referred to in the
[fol. 3060] 3-C form of contract?

A. It is.

Q. In making this compilation, did you come across any 3-C sales contracts that called for the dealers purchasing his entire requirements?

A. I did.

Q. Are those contracts included in this compilation?

A. They are.

Q. Where did you classify them?

A. The 90 per cent and over group.

Mr. Paradise: The defendant offers Exhibit Y in evidence.

The Court: All right.

Mr. Paradise: No further questions.
The Court: It may be received.
The Clerk: Exhibit Y in evidence.

(The document, heretofore marked Defendant's Exhibit Y, for identification, was received in evidence.)

Mr. Dixon: No questions.
The Court: Step down.

(Witness excussed.)

The Court: Have you another short witness?
Mr. Paradise: Yes, I have another short witness.
The Court: All right.
[fol. 3061] Mr. Paradise: Mr. Peterman.

JOHN F. PETERMAN, called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination.

The Clerk: What is your name, please?
The Witness: John F. Peterman.

By Mr. Paradise:

Q. You are an employee of the Richfield Oil Corporation, Mr. Peterman?
A. Yes, sir.
Q. In what capacity?
A. Administrative assistant in the Accounting Department.
Q. Mr. Peterman, I want you to explain, if you will, please, this instrument which I will show you, which represents an additional compilation.
Mr. Paradise: Will you mark this, please?
The Clerk: Defendant's Exhibit Z, for identification.
The Court: We will be running out of letters now, and will have to double up.

(The document referred to was marked Defendant's Exhibit Z for identification.)

[fol. 3062] Mr. Paradise: Do you have Defendant's Exhibit M, please?

(The document was handed to counsel.)

By Mr. Paradise:

Q. Mr. Peterman, I show you Defendant's Exhibit Z, for identification, which is stated to be a comparison of gasoline gallonage sold to Richfield L-O stations, dealer 3-C stations, and dealer stations compared with the total gasoline gallonage manufactured by all companies in the states mentioned. By examining this Exhibit Z, and also by referring to the stipulation of facts, which is Defendant's Exhibit M, will you state where these respective figures came from?

Mr. Paradise: I might state to the court, for purposes of simplicity, that this compilation is on a comparative basis, and it shows the relative ratios of gallons sold through L-O stations, with quantities, total quantities manufactured, and I am putting this witness on primarily to show the figures, which are already in evidence in a different exhibit.

By Mr. Paradise (Continuing):

Q. Will you state, Mr. Peterman, the source of each of these figures in relation to Defendant's Exhibit M, the stipulation of facts?

A. The gallonage reflected by this statement, as it applies to the L-O stations, the dealer 3-C stations and the dealer stations has been taken from Table IV, supporting the stipulation identified as Defendant's Exhibit M-1, and specifically [fol. 3063] identified as Defendant's Exhibit M-5.

The Court: I presume the gallonage as to all states comes from the Bureau of Mines, does it not?

The Witness: No, your Honor, the gallonage I was referring to is the gallonage sold by Richfield to the service stations.

The Court: I know that, but the gallonage for the companies in the field comes from the Bureau of Mines, does it not?

The Witness: Yes. Now you are referring to the first column?

The Court: To the first column.

The Witness: The gallonage shown in the first column under the caption, "Total gallons manufactured" is the total gallons of gasoline manufactured by all companies in the states referred to in the title of the report, and that, for the purposes of this report here, has been taken from Table No. V, which is Defendant's Exhibit M-6. Getting back to the statement you made, that is taken from the Bureau of Mines' report, as it applies to all states but the state of Idaho.

The Court: They don't have it?

The Witness: In the state of Idaho we obtained those figures direct. There is only one refinery there.

The Court: I see. All right.

[fol. 3064] By Mr. Paradise:

Q. Now, the column entitled "Richfield Dealer Stations," does that refer to the so-called 337 stations, as we have identified them here?

A. The 337 stations, that is correct.

Q. Turning to the second page, and referring to the statistics for the year 1950, is this a correct interpretation of this compilation, that the number of gallons sold to Richfield L-O stations constituted 2.71 per cent of the total gallons manufactured by all companies in the area for that year?

A. That is correct.

Q. And that the gallons sold through dealer 3-C stations constitute .34 per cent of all gallons manufactured by those companies in that area?

A. That is correct.

Q. And that the gallons sold to the so-called 337 stations constitute 1.14 per cent of the total gallons manufactured?

A. For that year; that is correct.

Mr. Paradise: For that year. The defendant offers Exhibit Z in evidence.

Mr. Dixon: That is objected to as irrelevant and immaterial.

The Court: It may be received.

The Clerk: Exhibit Z in evidence.

[fol. 3065] (The document, heretofore marked Defendant's Exhibit Z, for identification, was received in evidence.)

The Court: Look at the trouble that is going to save me. If I write an opinion, I can just put them in, and I don't have to go through and pick them out.

Mr. DeMartini: We want to switch attorneys in the middle of the stream, your Honor.

The Court: That is all right.

By Mr. DeMartini:

Q. Mr. Peterman, I will show you a certain instrument entitled, "Statistical Record of Rentals and Rental Costs," and ask you what that instrument is, or what those instruments are.

A. This is an instrument which is maintained by the accounting department for the purpose of recording thereon by months the gallonage of gasoline delivered to the service station, and it reflects, after the computation is made, the rental which is paid and received on that particular service station.

Q. And those cards relate to which service stations?

A. The card I am looking at now relates to the service station located at 2304 Northwest Burnside Street, Portland, Oregon.

Q. Will you state what the gallonage of that station, as reflected on those records, was for the period from January [fol. 3066] 1, 1942 to March 16, 1942?

A. There isn't a total on here for that, but it is made up of three figures: 11,856 gallons for January, 10,750 gallons for February, and 5,350 gallons for the period March 1st to March 16th.

Q. Now, will you also state what the gallonage, as reflected from those records, was for the period from January 1, 1944 through the month of April, 1944?

A. In the month of January, 1944, the gallonage was 8,256, the gallonage for February was 8,250, and the gallonage for March was 11,833, and the gallonage for April is 10,416, and the card indicates there was no gallonage for the period from May 1 to May 3rd, inclusive.

[fol. 3067] Q. Now, will you state what the highest gallonage was during the period from March 1942 through April 1944, with the exception of the month of August 1942 in which month it did exceed 18,000 gallons?

A. Well, do you want the highest month besides that month?

Q. By examining that instrument, can you give us a rough calculation of what the average gallonage was during the period commencing April 1942 and ending April 30, 1944? That is a period of 25 months.

A. I would estimate that it averages approximately 11,000 gallons a month.

Q. In fact you had already computed that figure, had you not?

A. Yes.

Q. And the average is 11,531 gallons?

A. That is correct.

Mr. DeMartini: I may state, your Honor, this was for the purpose of refuting certain testimony of Mr. Edgar, an L-O operator.

The Court: All right.

Mr. DeMartini: That is all, Mr. Peterman.

Mr. Dixon: Just a couple of questions, your Honor.

The Court: All right.

[fol. 3068] Cross-examination.

By Mr. Dixon:

Q. Mr. Peterman, I notice that your Exhibit Z does not contain any column indicating the total gallons of gasoline which was sold through the retail outlets within the area covered by your exhibit. Do you happen to know what that figure was for the year 1950?

A. Well, I believe the statement does show the gallonage sold to retail outlets, if you are considering——

Q. I am talking about all of the retail outlets to which anyone manufacturing that gasoline referred to in column one of Exhibit Z sold that gasoline to. Do you understand my question?

A. Would you mind repeating it?

Q. Does your Exhibit Z show how much of the gasoline manufactured was sold to all of the retail outlets within the area covered by Exhibit Z for resale purposes?

A. No, sir.

Mr. Dixon: That is all. And you don't know—pardon me.

Q. You do not know what that amount is, do you?
A. No, sir.

Mr. Dixon: Thank you. That is all.
The Court: All right, gentlemen. You have concluded a long day with a lot of folios. I think you have written a lot of testimony down there.
[fol. 3069] Mr. DeMartini: Judge, may I interrupt you? We have Mr. Daley of the FBI here who was subpoenaed as a witness. We have about three questions to ask him, if you want to get rid of him.
The Court: What is the FBI doing here? Well, all right. Being that they try to be nice to lawyers and judges and doctors, an FBI man, we will take him on.

James E. Daley, called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?
The Witness: James E. Daley, D-a-l-e-y.

Direct examination

By Mr. DeMartini:

Q. What is your address, Mr. Daley?
A. 2335 Glenada Avenue, Montrose, California.
Q. What is your occupation?
A. I am a special agent with the Federal Bureau of Investigation.
Q. In connection with the investigations in this case will you state how many 337 and 3-C dealers you talked to in the district under your supervision?

Mr. Dixon: If the court please, I object to that question on the ground that it is wholly irrelevant and immaterial.
The Court: I do not believe it is material how many he [fol. 3070] talked to. As a matter of fact it was at my suggestion the Government eliminated some of the dealers.

And I can't see what difference it makes as to how many he talked to or he did not talk to.

Mr. DeMartini: It was our thought, your Honor, that it had a bearing on the selectivity of witnesses and the showing of a planned program.

The Court: No, it has nothing to do with the case. As a matter of fact we are priding ourselves that in the trial of these cases we are not following the teaching in the East where they call everything a big case that goes on forever and ever. This very selectivity is very helpful. The pattern of conduct, whether it amounts to restraint or not, can be established as well by 10 or 20 as by two or three hundred.

The objection will be sustained.

Mr. DeMartini: No further questions.

The Court: All right.

Mr. Paradise: If the court please, there is a matter, I think, involving this subject matter, and that is the comment your Honor made some time ago. I have forgotten the exact reference in the transcript to the subject of cumulative testimony. It was our understanding of your Honor's remarks as to a large number of witnesses it referred to the pattern testimony, and that the type of witness who was not called was the so-called L-O operator as to whom we had a pattern established.

[fol. 3071] Now, Mr. DeMartini's question of this witness does not relate to the L-O operator. It related strictly to the independent.

The Court: It is not material in this or any one case how many witnesses the Government brings before the court. If any argument is possible to the effect that the Government has picked out certain particular things, it can be made on the basis of the record and not on the basis of what other witnesses may have been examined or have not been before the court, or the number of people that they did examine or they did not examine. It is not material at all.

Ultimately, I may say this, the Government's case being in, that the testimony on the part of the Government certainly established a pattern for every one of the three groups. So that if they had sought to introduce more, they would probably have heard from me.

So I do not see any materiality how many witnesses they

examined or how broad their investigation was. I do not see any argument can be based on it.

Mr. DeMartini: Thank you.

The Court: All right, Mr. Daley.

Mr. DeMartini: Off the record.

(Brief discussion off the record.)

The Court: Gentlemen, tomorrow is a legal holiday. I had forgotten it. It is red on the calendar and it is one of the very few legal holidays that we have. So we will recess [fols. 3072-3075] until Thursday morning at the regular hour.

(Whereupon, a recess was taken until 10:00 o'clock a. m., Thursday, May 31, 1951.)

[fol. 3076] Thursday, May 31, 1951, 10:00 A. M.

The Court: Gentlemen, I am sorry I was delayed but I had a conference with attorneys, unannounced, and we have been taking all this time. I have been here since ten minutes to 9:00. So let us go on.

Mr. Paradise: Your Honor, before proceeding with another witness I have a motion to make concerning Government's Exhibit 30. I do not know the proper procedure in this regard, if the court please, but since the close of the last session, when that exhibit was offered, we are informed by counsel for the Government that it is not an instrument signed by the person whom it purports to be, but is a group of instruments prepared by Government counsel as copies of instruments found in the defendant's file.

The basis of my motion is that we are also informed by Government counsel that the instrument is not complete, that is to say, that there were check marks on other portions of the instruments that are not included here, therefore, the instrument is not what it purports to be.

The Court: All right.

Mr. Dixon: If the court please, the Government represents, as we did at the time it was offered, that that is a copy made by Mr. Hall from a document of identical import and language and form in the files of the defendant, or made

[fol. 3077] from the original which was in the files of the defendant and which was examined by Mr. Hall. Mr. Hall does inform me that there may have been some other marks on those exhibits by way of favorable comment or grades. Perhaps Mr. Hall can better state those himself. But there is no question, at least the Government represents, that everything contained thereon was in fact contained on the original of which that is a copy. And it was offered subject to verification or production of the original by the defendant. We still feel that it is properly in evidence for that purpose.

The Court: I think it was used on cross examination, was it not?

Mr. Dixon: Yes, it was, your Honor.

The Court: Let me see.

Mr. Dixon: On page 1912.

The Court: Yes. I am looking at it now.

Mr. Dixon: You will find the offer and you will find——

The Court: Just a moment.

Mr. Dixon: —previous inquiry concerning that form immediately preceding and following that page.

The Court: I think the only relevancy of this matter, gentlemen, is this: That counsel called attention of the witness to the fact that a deportment card, which it was his contention only applies to L-O operators, was filed in another type of station. And I think his answer was that he had no [fol. 3078] business doing that in the first place.

Mr. Paradise: I see.

The Court: I think, in view of the limited scope of the examination, the only thing, really, in the record is that such a report was made. If you insist on it, I will mark it for identification. If you want to, I will have you put in, in conjunction with it, the entire set.

Mr. Paradise: Yes. I have no desire to do that, if your Honor please, because these records, if they still exist, are in Seattle. Those records are destroyed currently and I do not know that they exist. So I will be glad to——

The Court: For the limited purpose—for instance, here is the point, gentlemen, when it comes to the rules of evidence. Where you refer to a document and the purpose is limited, supposing it had been a clipping; suppose he had

taken a clipping from the newspaper. Was this Seattle or Portland? I forget.

Mr. Dixon: Seattle.

The Court: Supposing he had taken a clipping from the P. I., which is the main paper or the Times, or the afternoon paper—you see, I always know what newspapers are in town. Supposing they had a clipping and they showed it to Mr. King and stated: Look, Mr. King, here is an item that so and so while inspecting the station had met with an accident and he had asked him if that would not indicate to [fol. 3079] him that possibly the man was examining the station when he had no business to. Regardless of the proper foundation, that means of bringing a fact to the attention of the witness brings the document in not as proof but merely as bringing out a possible admission a man may have done that, and that is all that document is in there for.

Mr. Paradise: Thank you. On your Honor's statement I will withdraw the motion.

The Court: All right.

Mr. Paradise: I did not want to leave the record in the state that would indicate that unauthorized stocks was the only thing that that form was used for, even by that person Mr. King testified to.

The Court: Let us have it this way: It is understood, gentlemen, that you picked out only certain markings and there are other markings in which you are not interested.

Mr. Dixon: That is correct, your Honor.

The Court: These even mark that the boy had a clean shave and haircut. I had better watch myself here.

[fol. 3080] Just one minute before we go on. I want to talk to Mr. Childress.

(Discussion between the court and the clerk.)

Mr. Dixon: May it please the court, may it be stipulated between counsel for the government and the defendant that J. T. Chapman is the assistant division manager in charge of merchandising for the Northern Division of the defendant, and that he was in that position on May 22, 1950?

Mr. Paradise: So stipulated.

HUGH RANKIN, called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination:

The Clerk: What is your name, please?
The Witness: Hugh Rankin.
The Clerk: How do you spell your last name?
The Witness: R-a-n-k-i-n.

By Mr. DeMartini:

Q. What is your occupation, Mr. Rankin?
A. Paymaster for Richfield Oil Corporation.

The Court: Speak a little louder. You are the man they want to have talk up.
Mr. DeMartini: Yes, I can hardly hear you.

[fol. 3081] By Mr. DeMartini:

Q. In such capacity you have charge of the original pay roll records of the Richfield Oil Corporation; is that correct?
A. That's right.
Q. Did you examine those records this morning with respect to an employee, R. W. Dart, who is located at Portland, Oregon?
A. I did.
Q. What is his occupation?
A. Special retail representative.
Q. How long has he held that position?
A. Since November 1, 1949.

Mr. DeMartini: That is all, Mr. Rankin.
Mr. Dixon: No questions.
The Court: Step down.

(Witness excused.)

JOHN F. PETERMAN, recalled as a witness by and on behalf of the defendant, having been previously sworn, was examined and testified as follows:

Direct examination:

The Clerk: It is John F. Peterman?
The Witness: That's right.
The Clerk: You have been heretofore sworn.

[fol. 3082] By Mr. DeMartini:

Q. I will show you Defendant's Exhibit Y, Mr. Peterman, and ask you whether you are familiar with that document.
A. I am.
Q. Can you state whether there are included in the compilations set forth therein any 337 contracts which were executed prior to the month of August, 1948?
A. There are.

The Clerk: Defendant's Exhibit AA, marked for identification.

(The document referred to was marked Defendant's Exhibit AA, for identification.)

Mr. DeMartini: I will hand a copy to your Honor.
The Court: Another chart?
Mr. DeMartini: Yes, sir.

By Mr. DeMartini:

Q. I will show you a document entitled, "L-O Stations Leased by Richfield. Statement of Rentals Paid and Received," marked Defendant's Exhibit AA, for identification, and ask you whether you are familiar with that instrument.
A. I am.
Q. Was it prepared from the original records of the corporation?
A. Yes, sir.
Q. Will you describe, briefly, what that instrument purports to be?

[fol. 3083] A. This instrument reflects for the years 1946 to 1950, inclusive, the rentals paid and received on leased

out stations leased by Richfield, together with the gasoline gallonage sold to those stations, and the rental rates per gallon for rentals received and paid, including the amount of excess rental cost absorbed by Richfield.

Q. By "excess rental cost absorbed," you mean the difference between the amounts paid by Richfield and the amounts collected from the L-O operators; is that correct?

A. That is correct.

Q. Do I also understand that this instrument includes those incidents of stations wherein the bare land is leased by Richfield, and on which Richfield itself erected improvements at its own cost, and thereafter sublet the premises to an L-O operator?

A. It does include such rentals.

Mr. DeMartini: I will offer this in evidence.

Mr. Dixon: Objected to, your Honor.

The Court: What did you say?

Mr. DeMartini: I said I will offer it.

Mr. Dixon: The usual objection, your Honor.

The Court: The usual objection, and the usual ruling.

These are nice: In imagination I can see how I can use these figures.

The Clerk: Defendant's Exhibit AA in evidence.

[fol. 3084] (The document referred to, heretofore marked Defendant's Exhibit AA, for identification, was received in evidence.)

Mr. DeMartini: Mark this, please.

The Clerk: Defendant's Exhibit AB, marked for identification.

(The document referred to was marked Defendant's Exhibit AB, for identification.)

By Mr. DeMartini:

Q. I will show you an instrument entitled, "Richfield's Investment In L-O Stations As Of December 31, 1950," marked Defendant's Exhibit AB, for identification, and ask you what that instrument purports to be. First, was it prepared from the original records of the corporation?

A. It was.

Q. Second, what does it purport to be?

A. The instrument reflects Richfield's cost of land purchased with respect to L-O service stations, and also the cost of the improvements installed at L-O service stations.

Q. And those improvements have been depreciated; is that correct?

A. These figures are the depreciated values.

Q. Do I also understand that these figures do not include improvements of the nature of tanks, pumps, compressors, hoists, signs, highboys?

[fol. 3085] A. That is correct.

Mr. DeMartini: I will offer this in evidence, your Honor.

The Court: It may be received.

Mr. Dixon: The same objection, for the record, your Honor.

The Court: The same ruling.

The Clerk: Defendant's Exhibit AB in evidence.

(The document referred to, heretofore marked Defendant's Exhibit AB, for identification, was received in evidence.)

Mr. DeMartini: Will you mark this, please?

The Clerk: Defendant's Exhibit AC, marked for identification.

(The document referred to was marked Defendant's Exhibit AC, for identification.)

By Mr. DeMartini:

Q. I will show you an instrument marked Defendant's Exhibit AC, for identification, entitled "Cost of Construction of Refining Facilities Under Defense Supplies Contracts," and ask you if that instrument was prepared from the original record of the corporation.

A. It was.

Q. What does it purport to show, Mr. Peterman?

A. This instrument sets forth the cost of refining facili-

[fol. 3086] ties installed under Defense Supplies Corporation Contract No. ND-N-2139, dated February 3, 1942, and also the cost involved in refining facilities installed under Defense Supplies Corporation contract No. WD-N-30367, dated February 20th, 1943.

Mr. DeMartini: No further questions.
Mr. Paradise: You did not offer that.
Mr. DeMartini: I don't think I am going to offer that at this time.

By Mr. DeMartini:

Q. You specified the amounts, did you not?
A. I didn't give the segregated amounts, no.

Mr. DeMartini: I think you had better do that.
Mr. Dixon: It is all right with me if you offer it, and I will just make my usual objection.
Mr. DeMartini: I will offer the exhibit in evidence.
Mr. Dixon: The same objection, your Honor, for the record.
The Court: It may be received.
The Clerk: Defendant's Exhibit AC in evidence.

(The document referred to, heretofore marked Defendant's Exhibit AC, for identification, was received in evidence.)

Mr. DeMartini: That is all, Mr. Peterman.

[fol. 3087] Cross examination

By Mr. Dixon:

Q. Mr. Peterman, I direct your attention to page 32 of Government's Exhibit 26-A, and particularly direct your attention to the gallonage of gasoline reported sold to the L-O stations by Richfield during the years 1946 to 1950, inclusive, as stated therein. I now direct your attention to the item entitled, "Gasoline gallonage," under the heading "L-O Stations Leased By Richfield," for the years 1946 to 1950, inclusive, as set forth in your Exhibit AA, and ask you as to whether the figures reported in Government's Exhibit 26-A for the years 1946 to 1950, inclusive, are the same as the figures reported in Defendant's Exhibit AA for the same years.
A. No, sir.
Q. Do the figures as set forth in Defendant's Exhibit AA, for gasoline gallonage for the years 1946 to 1950, respectively, represent in that exhibit the gallonage of gasoline

sold to all of the L-O outlets with which the defendant has leases of the 542 type?

A. No, sir.

[fol. 3088] Q. What do these figures, then, under "gasoline gallonage" actually represent in Exhibit AA?

A. If you will note, the Exhibit AA reflects the statement there that that does not include any L-O stations which are fee-owned.

Q. So that the difference between the gallonage figures for the years 1946 to '50, inclusive, in Government's Exhibit 26-A and those contained in Defendant's Exhibit AA represent the gallonage sold to those stations in which the fee is owned by Richfield, is that correct?

A. That is correct.

Q. Now with reference to Exhibit AC does the amount of $20,000,000-plus in that exhibit represent the total cost to Richfield of the refinery facilities constructed pursuant to those contracts referred to in Exhibit AC?

A. That is correct.

Q. What amortization privilege or what amortization basis for tax purposes was taken by Richfield in amortizing those expenses, if you know?

Mr. DeMartini: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled. Oh, no. Where they are giving gross figures, we want to see how they are carried on the books, whether there are any deductions from them, so the ultimate capital investment is ascertained.

[fol. 3089] A. I do not have sufficient knowledge to answer that under oath.

The Court: Those are capital investments on which they are entitled to deductions and on which, in case of sale, they would be entitled to a capital loss or capital gain.

By Mr. Dixon:

Q. Do you know as a fact whether this cost of $20,000,000-plus was amortized by Richfield for tax purposes over a five-year period under the provisions of the law pursuant to which these contracts were entered into, Mr. Peterman?

A. I do not know that as a matter of fact, no.

Q. Can you make it your business to make that determination?

A. I could.

Q. And indicate to us at your earliest convenience as to whether or not these properties represented by the $20,000,000-plus cost to Richfield have in fact been completely charged off by Richfield under the five-year provisions of the law mentioned for tax purposes? Do you understand my question?

A. I do.

Q. In other words, we would like to know for tax purposes the value at which these properties, speaking about these particular ones, now——

A. I understand.

Q. —referred to in Exhibit AC represented by these [fol. 3090] expenditures, at which value they are carried on the books of the corporation for tax purposes at the present time, and as to whether they have been completely charged off or depreciated off for tax purposes by Richfield under the provisions of the Act.

Mr. Paradise: Mr. Dixon.

Mr. Dixon: Yes.

Mr. Paradise: If it will serve your purpose, I will stipulate that, subject to our objection as to materiality, in the tax treatment of these facilities that Richfield Oil Corporation applied for and obtained a certificate of necessity covering both of the two facilities.

Mr. Dixon: That does not quite answer my question. If counsel will stipulate that these expenditures or the costs have been completely depreciated to a point where this $20,000,000-plus cost has been charged off by Richfield within the five-year period, it will not be necessary for Mr. Peterman to give us the information as requested.

Mr. Paradise: If you are speaking about depreciated for only income tax purposes——

Mr. Dixon: That is right.

Mr. Paradise: —I think we can stipulate. And I will ascertain during the recess to make sure whether that is a correct statement.

Mr. Dixon: That is what we are endeavoring to determine. [fol. 3091] And if it is stipulated that for income tax

purposes these expenditures have been completely depreciated and charged off, it will not be necessary for Mr. Peterman to give us the information requested. Thank you, Mr. Peterman.

KENNETH G. LOVIN, called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name, sir?
The Witness: Kenneth G. Lovin, L-o-v-i-n.
Mr. Hall: I could not hear your, sir.
The Witness: Kenneth G. Lovin.

Direct examination.

By Mr. DeMartini:

Q. What is your occupation?
A. Senior clerk, Richfield Oil Corporation, Pasadena branch.

The Court: Just a moment.

By Mr. DeMartini:

Q. What did you say your occupation was?
A. Senior clerk.
Q. Senior clerk?
A. Yes.

The Court: All right, go ahead. That is all right.

By Mr. DeMartini:

Q. I will show you a series of photographs which have been marked Defendant's Exhibit AD for identification and [fol. 3092] ask you when those photographs were taken?
A. A portion were taken on the 25th of May and a portion were taken, the balance were taken on the 29th.
Q. Of this year?
A. Yes, of this year.
Q. Now, were you present when those photographs were taken?
A. I was.

Q. And do they fairly represent the condition of the service station buildings and facilities as of the dates that they were taken?

A. They do.

Q. I will ask you to identify each of these by location, if you will.

A. This No. 1 item is Gene Gebel, service station located on West Alosta Avenue, which I think is part of Highway 66, and that is in the town of Glendora. You want both of these?

Q. Yes.

A. The second one is of the same station. The next is a service station of Ray L. Johnson.

Q. Will you speak louder, please, so they can hear you?

A. A service station operated by Ray L. Johnson, 954 West Holt in Pomona. The next picture is also of the same location.

[fol. 3093] The next picture is of a dealer, George Anglen. It is located at 1693 North Garey in Pomona. The following picture is of the same station.

The next picture is of Clair V. Ward's service station at 2601 West Mission in Alhambra. The following picture is of the same station.

The next picture is of a station operated by E. W. Lineback at 321 West Mission in Alhambra. The following picture is of the same location.

The next picture is of a service station operated by Jones & Coutts. It is located at Fair Oaks and Glenarm in Pasadena. The next picture is of the same station.

The next picture is of a station operated by W. T. Coffman. It is located at 14208 East Garvey Boulevard, Baldwin Park.

The next picture is of a station operated by Theodore Jones which is located at 8303 Mission Drive, San Gabriel. That completes them.

Q. Do you have any knowledge as to what type of service stations these are, that is to say, whether they are independent service station dealers on Richfield's form 337 or on Richfield's form 3-C?

A. They are all independent, on the 337 sales contract, with the exception of the Clair V. Ward station which is a 3-C deal.

[fol. 3094] Q. Is it correct to state that an examination of those photographs show in each instance that Pennzoil is displayed for sale?

A. Yes, that is true.

Q. Is it also true that all of these stations lie within an area described as from Los Angeles city limits at approximately Fremont Street in Alhambra, or just to the side of that, through to Ontario, and from Valley Boulevard to and including Azusa and such towns through there?

A. They do, that is true.

Mr. DeMartini: I may state that that is the description which Mr. Ellis gave of his territory, your Honor.

The Court: Well, he had a batch of tires in one of them. He did not get the markings on the tires. They looked like second-hand tires to me.

Mr. DeMartini: This testimony is merely to refute the testimony of Mr. Ellis.

The Court: Pennzoil.

Mr. DeMartini: Yes, who claimed to be an assiduous salesman, and nonetheless could not sell Pennzoil in this area. That is all.

The Court: Well, all right.

Mr. Dixon: We object, your Honor. We do not think it is competent for the purposes mentioned. But if your Honor likes the pictures, we have no objection to them.

[fol. 3095] Mr. DeMartini: We offer them into evidence.

The Court: All right, they may be received.

The Clerk: Defendant's AD in evidence.

The Court: I am not approving counsel's statement as to what they show. I am receiving them as showing that in some of the stations photographed Pennzoil products are exhibited and in one of them he has quite a group of—what do you call them, Pennzoil dispensers? Is that what you would call them, or what?

Mr. DeMartini: I think they are called highboys.

The Court: What do they call them?

Mr. DeMartini: Highboys.

The Court: Highboys. All right, it may be received.

(The document referred to was marked Defendant's Exhibit AD and received in evidence.)

Mr. Paradise: Mr. Dixon, in the interval since Mr. Peterman testified, he has checked with his office and I am now in a position to stipulate that, subject to our objection as to materiality, the cost figu-es of the refinery installations described on Defendant's Exhibit AC have for income tax purposes only been fully depreciated within a five-year period covered by the data.

Mr. Dixon: Thank you.

Mr. Paradise: Mr. Day.

[fol. 3096] David E. Day, called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: David E. Day.

Direct examination

By Mr. Paradise:

Q. Mr. Day, what is your present status with the defendant corporation, Richfield Oil Corporation?

A. I am vice-president in charge of manufacturing.

Q. How long have you occupied that office?

A. Since April 1945.

Q. Prior to that time, but nevertheless commencing in the time of the incorporation of Richfield Oil Corporation, what office have you held?

A. I was assistant to A. M. Kelly who was vice-president in charge of manufacturing for the Richfield Oil Corporation.

Q. For the purpose of describing your experience generally will you state what your occupations have been with respect to petroleum refining operations prior to 1937?

A. From 1923 on I was refinery engineer in charge of selection of processes and installation of processing equipment. From 1937 to 1945 I was in charge of the technical end of the manufacturing department, and in that position had charge of the processes selection and processes deter-[fol. 3097] mination, and kept myself familiar with refining processes and processes used in that industry gener-

ally. Since 1945 I have been in charge of both operations and the technical matters in connection with the manufacturing department.

[fol. 3098] Mr. Paradise: May I have these marked, please?

The Clerk: Defendant's Exhibit AE, marked for identification, and Defendant's Exhibit AE-1, marked for identification.

(The documents referred to were marked Defendant's Exhibits AE and AE-1, for identification.)

Mr. Paradise: Defendant offers in evidence Defendant's Exhibits AE and AE-1, which consists, respectively, of two contracts between the Richfield Oil Corporation and Defense Supplies Corporation, the first contract identified as Exhibit AE being dated February 3, 1942, and the second contract identified as AE-1 being dated February 20, 1943. I might mention to the court that these were covered by a request for admissions prior to the trial, and that the government has copies of them.

The Court: All right.

The Clerk: Exhibits AE and AE-1 in evidence.

Mr. Dixon: Just our usual objection, your Honor, on relevancy.

The Court: Overruled.

(The documents referred to, heretofore marked Defendant's Exhibits AE and AE-1, for identification, were received in evidence.)

By Mr. Paradise:

Q. Mr. Day, I show you the two contracts between Rich-[fol. 3099] field and Defense Supplies Corporation, dated in 1942 and 1943, respectively, and ask you to describe briefly what refinery facilities were installed pursuant to those contracts, respectively.

A. As to the contract of February 3, 1942 there were installed an addition to an existing alkylation unit, an addition to some super-fractionation units, and isomerization unit, and related equipment which was auxiliary equipment in connection with those units.

Q. Is that the equipment referred to as having cost $2,647,000 in Exhibit AC?

A. I haven't seen the defendant's Exhibit AC, but that was the cost, yes.

(Counsel hands document to witness.)

A. Yes.

Q. And that is the equipment to which you have referred that was installed under that contract?

A. Yes.

Q. What equipment or facilities were installed under the second contract?

A. Under the second contract an entire additional alkylation unit was installed, some additions to the superfractionation equipment, a catalytic cracking unit, and auxiliary equipment, as before.

Q. Are those the facilities the cost of which is referred to in Defendant's Exhibit AC?

[fol. 3100] A. That is the second item, yes.

Q. What was the approximate cost of those facilities?

A. $17,854,000.

Q. Calling your attention to the second contract, the 1943 contract, Mr. Day, and to the portion of paragraph 1 of the contract that appears on page 2, which provides as follows:

> "Seller shall use its best efforts to expand said additional facilities and shall endeavor to maintain work on said expansion day and night insofar as the requisite labor and materials are available. Seller shall use its best efforts to complete such expansion as soon as possible, and not later than March 1, 1944."

Did Richfield so use its best efforts to work day and night, as provided for in the contract——

A. Yes.

Q. —to complete facilities?

A. Yes.

Mr. Paradise: Will you mark these, please, as AE-2 and AE-3?

The Clerk: Defendant's Exhibits AE-2 and AE-3, marked for identification.

[fol. 3101] (The documents referred to were marked Defendant's Exhibits AE-2 and AE-3, for identification.)

Mr. Paradise: Defendant offers in evidence two telegrams, both of which were similarly contained in a request for admissions, the first being a telegram dated December 2, 1941, addressed to Mr. C. S. Jones, president of Richfield Oil Corporation, and signed by Ralph K. Davies, Deputy Petroleum Co-ordinator, and the second being a wire dated September 9, 1943, addressed to E. W. Isom, Sinclair Refining Company, and signed by George L. Parkhurst, Chief, New Facilities and Economics Section, Refining Division.

Mr. Dixon: Objected to as irrelevant and immaterial.

The Court: Overruled.

The Clerk: AE-2 and AE-3 in evidence.

(The documents referred to, heretofore marked Defendant's Exhibits AE-2 and AE-3, for identification, were received in evidence.)

By Mr. Paradise:

Q. Mr. Day, Defendant's Exhibit AE-3 is this wire of September 9, 1943, addressed to Mr. E. W. Isom, Sinclair Refining Company, and signed by George L. Parkhurst. It is rather short, and I would like to read it to you, because I want to ask a couple of questions about it.

> "Understand that you desire in connection with certificate of necessity application for Richfield Oil Corpo-
> [fol. 3102] ration 100 Octane Aviation Gasoline project now under construction confirmation that this project is being installed as a part of expansion program requested by PAW to meet indicated shortage of one hundred Octane Aviation Gasoline particularly on West Coast. This will confirm that fact."

Signed, "George L. Parkhurst," and then his title.

Is the gasoline project referred to in this wire the facilities that you have described that were installed under these contracts?

A. Yes.

Q. Who is Mr. E. W. Isom of the Sinclair Refining Company, to whom this wire is addressed?

A. Mr. E. W. Isom was and is vice-president in charge of research for the Sinclair Refining Company.

Q. Do you know why this wire was addressed to Mr. Isom and refers to Richfield's project?

A. Well, Mr. Isom was representing Richfield in these negotiations with the Petroleum Administration For War.

Q. This wire states that this was, and I am quoting only a part, that this was an expansion program requested by PAW. Who is PAW?

A. "PAW" are the initials standing for Petroleum Administration for War, and was the government organiza-[fol. 3103] tion operating under the Secretary of the Interior, having charge of petroleum operations as they affected the government during the war.

Mr. Dixon: May the record merely show a continuing objection on the part of the government to this line of questioning?

The Court: All right.

Mr. Paradise: May it be stipulated, Mr. Dixon, that those telegrams were sent by those persons?

Mr. Dixon: Oh, yes. So the position of the government may be clear for the record, we do not contest or deny any of these documents were entered into or sent and received, or that Richfield did not build the facilities provided for therein.

The Court: All right.

Mr. Dixon: We merely contend that insofar as the issues in this case are concerned that they are irrelevant and immaterial.

The Court: Overruled.

Mr. Paradise: Perhaps for the record it should show the following admissions were requested under Rule 36, filed October 13th, 1950: That the telegrams were sent by the persons signing the same in their respective stated capacities, on behalf of the Petroleum Co-ordinator for War and the Petroleum Administrator for War, respectively, and [fol. 3104] were instrumentalities of the United States of America, and that Defense Supplies Corporation, party to the agreements above described, was an instrumentality of the United States of America.

By Mr. Paradise:

Q. Mr. Day, the two contracts with Defense Supplies Corporation, which you have before you, refer to the construction by Richfield of facilities for the manufacture of 100 octane aviation gasoline. Are those facilities usable in the manufacture of motor gasoline?

A. They are.

Mr. Paradise: I have one more short chart, your Honor.

The Court: Another one?

Mr. Paradise: Yes.

The Clerk: Government's Exhibit AF, marked for identification.

(The document referred to was marked Defendant's Exhibit AF, for identification.)

By Mr. Paradise:

Q. Mr. Day, I will show you Defendant's Exhibit AF, for identification, which consists of two pages, and I would like to direct your attention first to the second page. Will you explain the significance or meaning of the figures stated on that page?

A. That first figure shown is the capacity for manufacturing of aviation gasoline of the facilities installed by Richfield pursuant to these two contracts, the 15,000 bar- [fol. 3105] rels of aviation gasoline, 100 octane aviation gasoline per day.

The second figure is the equivalent capacity, or the capacity of the same facilities for the production of motor gasoline, which is 10,705 barrels of gasoline per day.

Q. Those figures are per day?

A. Those are per day.

Q. How many gallons of gasoline does a barrel contain?

A. 42.

Q. How do you account for the fact, Mr. Day, that the same facilities appear to have a smaller capacity for the manufacture of motor gasoline than they do for the manufacture of aviation gasoline?

A. Well, the facilities installed were of two types. The alkylation units and the catalytic cracking units actually produced more gasoline per barrel of crude processed.

The super-fractionation units did not produce more gasoline, but simply took from a barrel of gasoline some components of particularly high octane quality, which could be used in aviation gasoline, so that a portion of the facilities made more gasoline, and, consequently, could make more motor gasoline, whereas the other portion of the facilities simply took gasoline from the motor gasoline category, and put it into the aviation gasoline category, and, therefore, did not add to the total gasoline produced. [fol. 3106] Q. I see. Now, the figures that are represented on the second sheet show the capacity for the manufacture of motor gasoline of 10,705 barrels per day. Does that capacity relate solely to the facilities installed pursuant to the two contracts with the Defense Supplies Corporation?

A. Yes.

Q. Now, turning to the first page of this exhibit, will you explain what those items represent?

A. The items on the first page, item 1, is the capacity of Richfield's refinery to produce motor gasoline prior to the installation of the facilities installed under the two contracts, and that capacity was 32,875 barrels per day of motor gasoline.

The second statement is Richfield's refinery capacity for the production of motor gasoline after the completion of the facilities installed under the two contracts, which was then a total of 43,580 barrels per day.

Q. That is also of motor gasoline?

A. Of motor gasoline.

Q. Yes.

A. And the third statement is the percentage of increase of motor gasoline producing capacity made possible by the new facilities, which is 32-1/2 per cent.

Q. Now, the two contracts that you refer to are the contracts we have been talking about, between Richfield and [fol. 3107] the Defense Supplies Corporation; is that correct?

A. They are.

Q. And this increase of capacity relates solely to the new facilities installed pursuant to those contracts?

A. Pursuant to those contracts, yes.

Q. Then this figure of 32.5 per cent reflects increase of capacity for motor gasoline over the capacity prior to the installation of those Defense Supplies Facilities and is what resulted by the construction of those facilities; is that correct?

A. That is correct.

Mr. Paradise: Defendant offers in evidence Exhibit AF.

Mr. Dixon: The same objection, your Honor.

The Court: It may be received.

The Clerk: Exhibit AF in evidence.

(The document referred to, heretofore marked Defendant's Exhibit AF, for identification, was received in evidence.)

By Mr. Paradise:

Q. The additional facilities that we have discussed, have they been used for the manufacture of motor gasoline at all?

A. Yes, they have.

Q. To what purchaser did Richfield sell the quantities of aviation gasoline which it manufactured during World War II?

A. To Defense Supplies Corporation.

[fol. 3108] Q. To any other purchaser?

A. No, not to my knowledge. I think it was entirely to Defense Supplies Corporation.

Q. That was a wartime measure, was it not?

A. Yes.

Q. Did the end of World War II have any effect on the quantities of aviation gasoline purchased by the Government through Defense Supplies Corporation from Richfield?

A. Yes.

Q. What effect did it have?

A. Well, the amount of gasoline purchased by Defense Supplies was cut down from something like 17,000 barrels a day immediately prior to the cessation of hostilities to two to three thousand barrels a day subsequently.

Mr. Paradise: Will you mark this, please?

The Clerk: Defendant's Exhibit AG, marked for identification.

(The document referred to was marked Defendant's Exhibit AG, for identification.)

By Mr. Paradise:

Q. Mr. Day, I show you a telegram dated August 15, 1945, which, as I recall, was either V-J Day or the day following, addressed to Richfield Oil Corporation and signed by George Stoner, Associate Director, Office of Derense Supplies, and ask you if you received that wire in your capacity as head of the refinery. I believe at [fol. 3109] that time you were assistant to Mr. Kelly, were you not?

A. In August of 1945, no. I was at that time vice-president in charge of manufacturing.

Q. Oh, yes.

A. Yes, I did receive that wire.

Q. Was it pursuant to this wire that Richfield cut down its sales and deliveries of aviation gasoline to the government in the figures that you mentioned,——

A. It was.

Q. —at the end of World War II?

A. It was.

Q. How soon after that date did these new refining facilities commence making motor gasoline?

A. Practically immediately, as soon as we could do the physical switch-over.

Mr. Paradise: The defendant offers in evidence Exhibit AG.

Mr. Dixon: The same objection.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Exhibit AG in evidence.

(The document referred to, heretofore marked Defendant's Exhibit AG, for identification, was received in evidence.)

Mr. Paradise: No further questions.

[fol. 3110] Cross-examination.

By Mr. Dixon:

Q. Mr. Day, when was the work contracted for under these contracts completed?

A. As to the first contract, I believe it was in February, of 1943, and as to the second contract I believe it was in September of 1944. That is approximate. I would have to refresh my memory to give you the exact dates.

Q. What was the refining capacity of Richfield after the completion of these facilities, that is, the construction of these additional facilities, insofar as normal or regular gasoline is concerned, as distinguished from aviation gasoline?

A. That was given in my previous statement.

Q. But I am asking you now what it is.

A. Approximately 43,000 barrels per day of motor gasoline, after the completion of these facilities.

Q. Did you make any aviation gasoline at all, Mr. Day?

A. We did.

Q. Are you making any aviation gasoline today?

A. We are.

Q. How much are you making today, or refining today?

A. Approximately, somewhere in the neighborhood of seven to eight thousand barrels per day. That is a day.

[fol. 3111] Q. So, out of your 43,000 total capacity, 7,000 of that is being used today to manufacture aviation gasoline; is that correct?

A. We have considerably more than 43,000 barrels capacity today.

Q. What is your present capacity for refining motor fuel today, as distinguished from aviation fuel?

A. About 46,000 barrels, 46-47.

Q. That is independent of your capacity for aviation gasoline?

A. That is total gasoline capacity. It is 44 per cent of 108,000. I can't give you that very quickly.

Q. Now, I am getting a little confused myself, Mr. Day. What I would like to know is what is your present refining capacity for motor gasoline.

A. As of today?

Q. Per day, yes.

A. Somewhere in the neighborhood of 48,000 barrels.

Q. What is your present refining capacity for aviation gasoline per day?

A. It would be approximately the same as was previously stated, about 15,000 barrels per day.

Q. About how many?

A. About 15,000 barrels per day.

Q. So that your refineries today are able to turn out [fol. 3112] 48,000 barrels of motor fuel or gasoline, and 15,000 barrels of aviation gasoline?

A. No, a total of 48,000 barrels of gasoline, and whatever aviation gasoline you make has to be deducted from that, Mr. Dixon. You can't distinguish one from the other.

Q. I understand that.

A. You have to have a total.

Q. In other words, am I correct, Mr. Day, that you can use either facility to manufacture motor gasoline?

A. That is correct. You can use these facilities for making either motor gasoline or aviation gasoline, except as I described previously.

Q. So that the same facilities may be used to turn out either type of gasoline, aviation gasoline or motor gasoline?

A. That is correct.

Q. And your present capacity, then, for all types of gasoline per day at your refinery is what?

A. About 48,000 barrels.

Q. At the conclusion of, or, rather, at the completion of the construction under these contracts, I believe you testified your capacity was about 43,000 barrels per day?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q .So it is a fact, Mr. Day, that you have added to your [fol. 3113] refining capacity since the completion of these projects that you have referred to, that were requested by the PAW?

A. We have.

Q. What additional capacity have you added to your refineries since the completion of these other projects under the PAW contracts?

A. Those additions have been largely in the nature of removing bottlenecks, as we say in the refinery, rather than in the installation of any complete units. There have been no complete new units installed at the refinery since the equipment mentioned under those two contracts, but we have increased our straight-run crude facilities and we have learned how to operate our existing facilities a little better.

[fol. 3114] Q. But you have in fact increased the capacity, the refining capacity of the facilities of Richfield?

A. That is true.

Q. Since the completion of the PAW work referred to?

A. Yes.

Mr. Dixon: That is all.

The Court: Any redirect?

Redirect examination.

By Mr. Paradise:

Q. This I do not think is too important but I want the record to be straight about it. Mr. Day, I think that the statement was made that the same facilities could be used for the manufacture of either motor gasoline or aviation gasoline. Is that precisely correct?

A. Not precisely correct. It is correct as amplified in my prior statement, in that certain of the facilities actually make more gasoline which gasoline can be used either as aviation gasoline or as motor gasoline, whereas certain of the facilities simply take from gasoline aviation components which can be used as aviation gasoline, and those facilities, of course, cannot be used to make more motor gasoline.

Q. Then the capacities you gave of 48,000 barrels per day of motor gasoline as an approximation and 15,000 barrels per day of aviation gasoline are not cumulative?

A. Oh, no, no.

[fol. 3115] The Court: One is as good as the other. He made that statement.

A. The 48,000 is total.

The Court: That is right, the 15,000 is part of the 48?

The Witness: That is correct, sir.

until Tuesday morning, June 5th, for argument, and we will recess subject to call.

(Whereupon, a recess was taken until Tuesday, June 5, 1951 at 10:00 o'clock a.m.)

[fol. 3121] Tuesday, June 5, 1951. 10:00 A. M.

ARGUMENT

The Court: All right, gentlemen, cause on trial.

Mr. Dixon: May it please the court: The complaint in this case charges the defendant with a violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act. The specific offense charged is described, in particular, in paragraph 16 of the complaint, which is, in effect, that the defendant has entered into and is operating under contracts consisting of written and oral agreements and understandings between itself and independent service station operators, which contracts are an unreasonable restraint of and substantially lessen competition in interstate trade and commerce in petroleum products and automotive accessory products. The complaint then proceeds in further detail to describe the type of contract and arrangement referred to in paragraph 16 of the complaint.

The evidence in this case has shown that the restraints complained of, which the government contends have been effected through these contracts and understandings involved in 1950 a market for all products in excess of $45,000,000. This amount consisted of sales in gasoline in the amount of $39,025,113, greases and oils in the amount of $2,546,127, and TBA products, with a 30 per cent figure off that I will explain later, in the amount of $3,476,088.

The Court: What are you reading those figures from? [fol. 3122] Mr. Dixon: These figures, your Honor, are taken from Government's Exhibit 26-A.

The Court: That is all right. I just wanted to know.

Mr. Dixon: I should have given you the source.

The Court: Oh, it does not matter, but just for my notes, because in following the argument I like to know if there is an exhibit that embodies them, because then if I have any question, I can look at the exhibit.

Mr. Dixon: The number of written contracts involved are

in excess of 4500 in amount. Specifically, there are 1,343 written contracts in the form of a sublease which is contained in Form 542, Government's Exhibit 1-G. There are 261 lease forms, that is, leases from the operator to Richfield, 261 sublease forms back from Richfield to the operator, and 261 sales agreements or contracts involved in the 3-C type of arrangement, all of which are exemplified by Government's Exhibits 4, 4-A and 4-D on the sublease, 4-B and 4-C on the sales contract arrangement, and are known as Defendant's Forms 362, 668, and 783, respectively.

The Court: May I interrupt you?

Mr. Dixon: Yes.

The Court: This is a good stopping point. There was a little delay in disposing of another matter that is urgent.

(Another case called.)

[fol. 3123] The Court: All right. Now we can continue, gentlemen. I am sorry I interrupted you.

Mr. Dixon: It is all right, your Honor.

There are 1,361 written sales agreements and 853 painting agreements which were entered into at the same time as the sales agreements mentioned, and 241 paint agreements which were entered into subsequent to the execution of the sales agreements, which are on Form 337 and are identified in the record as Government's Exhibits 5-G and 5-F, respectively. These latter types of written arrangements are entered into under what have been referred to in the trial as the 337 type of arrangement.

The total amount, therefore, of written agreements is 4,581 of the type mentioned. In addition to these agreements there are oral arrangements and understandings which the Government contends are applicable to every one of the three types of outlets involved in this case.

As to gasoline and petroleum products it is the contention of the Government that this arrangement is oral in its nature as to the L-O type of arrangement and is written, of course, as to the other two types, the 3-C and 337 types of arrangement, as is expressed by the written type of sales contract.

As to tires, batteries, and accessories the Government contends that the arrangement is oral in nature as to all

types of the three stations outlets involved in this case. [fol. 3124] There are, therefore, 7,546 written and oral arrangements which the Government contends are before the court for its consideration of the type which we will discuss in a moment.

Now, the commerce involved exists or is effected through 2,965 retail outlets. These consist of 1,343 of the so-called L-O type of arrangement which is covered by the lease arrangement only and the oral arrangement dealing with gasoline and petroleum products and automotive accessories, 261 of the 3-C type of outlets, and 1,361 of the 337 type of outlets.

I believe the evidence has clearly shown that the defendant is engaged in interstate commerce in the manufacture and distribution of petroleum products as well as the sale and distribution of automotive accessories.

The record shows that insofar as the written types of contract are concerned that they are approved either at the divisional offices of the defendant, of which there are three in number, located, as your Honor recalls, in the State of California, Washington, and that the contracts come to the respective offices in those states from the various other states for the particular state for approval, and that some of the contracts involved are required to be approved at the main office of the defendant in Los Angeles. Hence there can be no question and we will not take any time to discuss the interstate commerce phase of the evidence, or the question that the contracts involved here are entered [fol. 3125] into in the course of interstate trade and commerce in the products involved.

The Court: I think you had better leave that for them, because my first impression is that all these transactions are interstate in character. There is not one that is localized. They all contemplate the distribution of products which are a part of an interstate flow, and that the same applies to contracts relating to accessories.

I would rather the defendant took that burden of showing what there is in the record to show the contrary, leaving, of course, the final determination to a later date. [fol. 3126] Mr. Dixon: Thank you, your Honor.

The Court: I merely approve your thought that the record for the present, at lease, will call for the defendant

to indicate as to what they think as to the local character of these transactions. It may well be in regard to one or two of these stations, if you took the trouble you might be able to determine that as of a particular date perhaps the things that went into the station, both into the tanks and the other part, had a local problem, but it would be a very difficult job to disentangle that from the entire business of the corporation, which is interstate.

Mr. Dixon: It is the contention of the government that these contracts and arrangements, which are exemplified by the written forms of the contracts and the oral evidence of the understandings and the course of dealing between the defendant and the operators operate to close this market in excess of forty-five millions of dollars from all competition from other suppliers of petroleum products and automotive accessories.

The government further contends that these contracts have had that intended purpose, insofar as the defendant is concerned, and that insofar as the law is concerned that they are in violation of both section 1 of the Sherman Act and section 3 of the Clayton Act.

The government further contends that the decision of [fol. 3127] this court, affirmed by the Supreme Court, in the case against the Standard Oil Company of California is directly applicable and in point, and is the law governing the case before this court.

We will, therefore, during the course of this argument make some comparisons between some of the figures on commerce in the Standard case and will discuss some of the contracts involved in that case, and show that, in substance and in effect, there is no real difference between the arrangements and the contracts before your Honor in this case, and those which your Honor has already ruled as being in violation of section 1 of the Sherman Act and section 3 of the Clayton Act.

Now, as to one type of outlet in this case, namely, the L-O type of outlet, the contention of the defendant seems to be, as expressed in their amended answer in paragraph 18, that each of these outlets in the L-O classification, so-called, was acquired as an outlet by the defendant for the sale of its petroleum products and, as they say and contend, the relationship between the defendant and the oper-

ator of this type of outlet is analogous to that of agency or employment and that the occupancy of the station leased is upon the understanding that the defendant has a right, a legal right, to designate as a condition of the operator's occupancy that the lessee or operator of this type of outlet [fol. 3128] shall handle exclusively the defendant's petroleum products and such automotive accessories as the defendant may approve, and sell for distribution to any one of the three types of outlets mentioned.

We will discuss this question in its application to the facts and the law applicable thereto in a consideration of the legal part of the argument.

As to the other two types of outlets it appears to be the contention of the defendant that those contracts are not illegal, that they do not impose any restraints on the operator of those outlets which are in violation of either the Sherman or the Clayton Acts.

Now, before we discuss the written contracts that are before your Honor in the record in this case, I would like, briefly, as a background, to compare the market involved with that involved in the Standard case, which, as your Honor recalls, was sixty-eight millions of dollars as against $45,000,000 in the instant case.

The government contends, of course, that, as a matter of law, under the decisions of the Supreme Court, which we will not go into, on the appreciable segment doctrine, and your Honor's decision, that commerce in excess of forty-five millions of dollars in any year is certainly an appreciable segment of commerce, and that, therefore, those decisions apply.

[fol. 3129] In the Standard case there were in excess of 8,000 written agreements and some 742 oral arrangements, so that approximately there were close to 9,000 written and oral agreements involved in that case, as against approximately 7500 involved in this case.

Now, in the Standard case, the provision which ran through all of the written contracts and leases and which was common to all of the written arrangements, was that the dealers involved undertook to purchase all their requirements of one or more products which they sold at the outlets involved in the Standard case.

It is the contention of the government that that is pre-

cisely the same undertaking which runs through all of the written and oral arrangements and understandings which are involved in this case, so that the effect of the contracts in the instant case is the same, in substance, as that in the Standard case, as I have previously indicated, namely, that you have an appreciable market, a segment of interstate commerce, in the dollar volume in excess of forty-five millions of dollars that is completely closed or shut off to all competition, and that that has been effected by these written contracts and oral understandings and arrangements, and that the defendant has, therefore, violated by these regulations and restraints imposed upon the dealers the Sherman and Clayton Acts.

[fol. 3130] Now, let us see what type of written arrangements the defendant has entered into in this case. As we have already indicated, one of the types of arrangement is a sublease. That runs through the L-O type of arrangement and the 3-C type of arrangement as well. The other type of document is the sales contract. That type of contract is in writing only in the 3-C and in the 337 type of arrangement.

[fol. 3131] But a comparison of the provisions of the L-O lease with those of the sublease in the 337 type of arrangement which I will discuss in a moment will show that the 337 type of arrangement has substantially all of the provisions, with a few modifications, which are contained in the lease in the L-O type of outlet.

Now, let us look at this L-O type of lease, Form 542, Government's Exhibit 1. That was first adopted in 1937, as the record shows, and it was really on a cancellation basis of six months. The tenure, in other words, was continuous, with a termination notice of 30 days which could be given prior to the end of any six months period if you wanted to cancel. That arrangement or provision is contained in paragraph 1 of Exhibit 1.

Then paragraph 10 we find an indemnification clause, for example, whereby the lessee agrees to indemnify the defendant against all loss, etc., and the various other types of provisions usually found in a lease are contained in this exhibit.

Exhibit 1-A, which was adopted in 1939, paragraph 15 was added. That is the only change and that paragraph is

one which states that there was no representation made or any inducements made to the lessee to enter into the arrangement.

Exhibit 1-B, which was adopted in February 1941, has a clause, No. 12, which is added and not found in the previous ones, which deals with what the operator shall [fol. 3132] do, that is, the number of hours that he shall keep open his station, etc.

Exhibit 1-D was adopted in June of 1943, contains for the first time the 24-hour cancellation clause, and that is found in all 542 leases after that date.

Exhibit 1-E, which was the Form 542 adopted in February of 1944, does not contain paragraph 12 previously found in Exhibit 1-B, which has to do with the control exercised or which the defendant wanted to exercise over the operator of the leased out unit insofar as the number of hours, etc., that the station must be kept open is concerned. In other words, in 1-E which was adopted in February of 1944 that control provision was taken out of the lease and, as your Honor knows from the evidence, that type of control was thereafter exercised entirely through an oral arrangement.

There was no substantial change in the 542 after that date, and Exhibits 1-F and 1-G, which were enacted or put in use in 1948 and 1949, respectively, were merely inserted in the record to show the continuing character of the lease form which I have just described.

Exhibit 2 was the type of lease which the defendant entered into with—oh, you might call it a truck station, the operator of which consumed or purchased a substantial amount of petroleum products and automotive accessories from the defendant. That lease contains substantially the [fol. 3133] same provisions as in 542, except that the defendant could cancel that on a five-day basis, and the rental was also fixed on that type of lease. For example, in Exhibit 2, that exhibit shows that the rental was $988 per month and that the term of the lease was for a period of five years, subject to this five-day cancellation provision I have mentioned.

In these two types of arrangements, as I have stated, an examination of the lease shows absolutely no provision dealing with the purchase or sale of any petroleum prod-

ucts from the defendant or any automotive accessories from the defendant, and the evidence in this case, I believe, clearly shows that was a matter entirely of oral understanding and arrangement between the defendant and the operator at the time these arrangements were made.

I want to briefly refer to the 2-B type of deal. It is not in effect now for the most part, but it does show the background and intention of the defendant with reference to controlling this type of outlet.

That, as your Honor knows, is a lease, sublease, and sales contract arrangement, and is shown by Government's Exhibit 3 through 3-A to -D, inclusive.

Exhibit 3 is the lease from the operator to Richfield. It is interesting to note that paragraph 2(b) of that lease gives the lessor, or the defendant, the right to make any changes he wants to in the station or the property leased [fol. 3134] so that it can be used for the purposes of selling petroleum products.

Paragraph 2(d) of Exhibit 3 also contained a provision that the lessor was not to engage in competition on any property which he might have within 200 yards of the premises leased, that is, not to sell any products competitive to those of the defendant within that area.

Paragraph 2(e) is interesting because it deals with the painting of the premises and it gives the defendant the right to paint this building that is leased to him if he want to do so, and also gives the right to remove any improvements that he may make on the property at the end of the lease.

Paragraph 7 then provides that the lessor may terminate the lease if the lessee does not pay any rent. And 11 gives them the right to terminate on three days notice.

The sublease which the defendant gives back to the operator under this type of arrangement is Government's Exhibit 3-A, and here, again, we find, as I suggested a moment ago, the same provisions as are contained in the 542 lease. For example, paragraph 3 of 3-A, the sublease, is the same as in Exhibit 1, namely, that the lessee shall make no changes in the premises without the approval of the defendant in writing. In other words, that provision prevents the lessee or the operator from making any change

of any kind in his property that he has leased to Richfield [fol. 3135] and then leased back, without he first secures the approval of the lessor or the defendant in writing.

Paragraphs 4, 5, 6, 8, 9, 10, 11 are exactly the same as they are in Exhibit 1, the sublease to the L-O type of operator. And paragraph 7 is interesting because it gives the lessor, that is, the defendant, the same right to take over the station as is given the defendant in its L-O type of arrangement, paragraph 7.

And then, of course, there is the sales contract provision, 3-B which I will discuss when I deal with the provisions of those contracts under the 3-C arrangement.

Now, the arrangement which is in effect today is better exemplified by Government's Exhibits 4. That is a lease from the operator to the defendant. Paragraph 3 of that lease requires the operator to make all repairs to the station leased on 10 days notice to the operator, which, of course, enables the defendant to completely control that station under this provision by requiring any changes that are in the nature of repairs, etc., to be made at the expense of the operator. Paragraph 4 provides, again, the painting arrangement, that the defendant may put tanks, etc., on the property leased and may paint the station. In other words, he is given the right under the lease to do that if he wants to.

Paragraph 5 gives the defendant the right to remove any improvements, etc., at the end of the lease.

[fol. 3136] Paragraph 8 says that the lessor shall not engage in competition with the defendant within 200 yards of the premises. That provision is like 2(d) in Exhibit 3 that I have mentioned.

Paragraph 11 says the defendant may offset the rents and amounts due from the lessor on any rents due, etc., from him under the arrangement.

Exhibit 4-A is the sublease back to the operator, and here, again, we find this paragraph 3 in the sublease is the same as paragraph 3 in Exhibit 1, the sublease to the operator in the L-O type of arrangement, namely, that the operator or lessee shall make no change in the premises at all without the written approval of the defendant.

Paragraph 4 is the same as in Exhibit 1. Paragraphs 5, 6, 7, 8, 9, 10, 11, and 13 are the same as in the sublease

under the L-O arrangement, but contain a provision that if the sales contract is cancelled—and this, of course, is the arrangement where you have a written sales contract—the lessor or the defendant, that is, this defendant may cancel this sublease on five days notice to the lessee.

In other words, that is important, your Honor, as we will point out in a moment, because of the exclusive requirement provisions that are contained in that written sales contract. In other words, if they are not complied with under the provisions that I have just mentioned of the lease from [fol. 3137] the defendant, the sublease from the defendant to the operator, the defendant may cancel that sales contract, and then the defendant may cancel this sublease on five days notice to the operator and he would still have in effect the underlying lease from the operator as long as he continued to pay the rental provided for in that lease to the operator.

Exhibit 4-B is the sales contract. The first paragraph thereof contains the exclusive dealing provision, with a minimum amount that the lessee or the operator is required to purchase. Paragraph 8, also, of this sales agreement, 4-B, provides that the defendant-seller can paint the station that is leased in the sublease and the lease that I have just mentioned and charge the dealer the costs of any painting done to the station prior to two years of the termination of that contract.

Now, that provision was not contained in the 2-B type of sales contract that I have mentioned which was not used substantially after the type of sales contract listed in Government's Exhibit 4 was brought into use in 1945.

Exhibit 4-D sublease contains a change which we believe is significant. Paragraph 3 of that exhibit—and this is that sublease to the operator—is changed. The provision is taken out that the lessee shall not make any changes in the property without the written approval of the defendant.

In other words, in 1948, after your Honor's decision [fol. 3138] in the Standard case, as your Honor recalls, there were some changes made by the defendant in some of these forms of contract, and that was one of them. In other words, up to that time they had a provision in the sub-

lease under the 3-C arrangement which enabled them to prevent the dealer or operator from making any changes in his premises at all, which, of course, would include putting in additional tanks or anything else of that type, without getting the written approval of the defendant.

Otherwise, Exhibit 4-D sublease is the same in form as that of those previously used.

Now, Exhibit 5 deals with the 337 type of arrangement, which your Honor will recall was a sales agreement and painting type of arrangement.

[fol. 3139] I might add, before I get into this type of arrangement, that the record shows that the leases and subleases and sales contracts, which are invoked and involved in the 3C type of arrangement were for an extended period of years. One of them in the record was for a period of 20 years; some of them for 10 years; some of them for 15; some of them for five. But the point is, your Honor, that they were long term arrangements and effectively operated for a long period of time, and that is important, I submit, as an indication under the law of the intention to control and monopolize that particular outlet.

Now, coming to the 337 type of arrangement, as I have indicated, the first one of those, Government's Exhibit 5, adopted in 1937, contained a maximum and a minimum requirement of purchases of petroleum products, and was generally for a term of one year. But here again paragraph 5 of Exhibit 5 gave the defendant the right to cancel that arrangement at any time on five days' notice without any reason,—I mean it was just a termination right with no comparable right given to the other party to that sales contract.

Government's Exhibit 5-A is the paint contract of the same date, or which was invoked at the same time, in August of 1937, and 5-B is the sales contract form that was adopted in June of 1938, and then 5-C is a painting agreement adopted in 1939, and that contains this provision, [fol. 3140] in paragraph 1, about no signs being put up on the premises without the approval, and so on, of the defendant, and the provision that the defendant may terminate the painting agreement and collect for the paint if the sales contract is canceled by the defendant at any

time, on any termination by the defendant. In other words, that is paragraph 3 of Government's Exhibit 5-C. The defendant could go in and cancel the sales contract if the operator did not buy his entire requirements, or I mean the amount specified in the contract, and cancel out that contract, and then collect on the paint contract under the provisions of the two agreements I have mentioned. And then in Government's Exhibit 5-D, which is the sales contract, adopted in 1948 after your Honor's decision, paragraph 1 is changed in that sales contract, and that paragraph gives the defendant the right to withhold delivery of gasoline, depending upon certain circumstances that are set forth in paragraph 1 of Exhibit 5-D.

Now, Government's Exhibit 5-E is the painting agreement which was adopted at the same time the sales contract, Exhibit 5-D, was put into effect, after your Honor's decision in the Standard case.

This paragraph 1 that I have mentioned in 5-D has been changed. The provision on the signs and the right to control the signs that may be put up on the premises, which had been in the painting contract up to that time, is [fol. 3141] removed, and paragraph 3 inserted and changed, and that provides that the defendant can only collect on the painting agreement if the agreement is terminated for a breach of the sales contract.

In other words, the point I wish to suggest to your Honor is that up to that time, as this change clearly shows, the defendant was always in a position to put the heat on the operator, and the penalty was always ready to be invoked, in a cancellation of the sales contract, which would automatically impose upon the operator the obligation to pay for the painting of the station, and the right or the permission to do so was given by these provisions that I have just described in the two types of arrangements.

Now, those exhibits, briefly, contain the written provisions in these contracts, which the government submits clearly shows the intention on the part of this defendant to completely control and monopolize the market of the operators who are subjected to and with whom they had these types of arrangements.

Now, I want to, while I am still dealing with the writ-

ten arrangements, turn now to the written form of contracts which the defendant used with its distributors and commission agents, because I believe that is important insofar as it relates to the defense of the defendant, which it is urging is applicable to the L-O type of outlet, namely, that the operator or lessee of that type of outlet is not an [fol. 3142] independent businessman. The contention of the government, of course, is, as I have suggested, that all of these operators, whether they are lessees under the L-O type of arrangement or whether they are lessors and lessees and parties to sales contracts under the 3-C deal, or just parties to the painting agreement and the sales contract under the 337 agreement, are independent businessmen, and that is the market here which has been foreclosed from all competition by this type of an arrangement.

Now, with that in mind, let us take a look at some of these agreements, that are shown by Government's Exhibits 6 through 6-A to -D, inclusive. Now, Exhibit 6-, which was first used in 1937, was the distributor's agreement, and paragraph 1 provides that the gasoline shall be consigned to the distributor, and under paragraph 2 that he is made a trustee for the defendant. Paragraph 4 requires him—and this is the only time that your Honor will find this provision in these arrangements, although the evidence shows that an oral arrangement was made subsequent to that—requires the distributor to purchase all of his TBA requirements from this defendant or from the persons designated. In other words, this provision No. 4 of Exhibit 6 on TBA was first applied in writing, and the only time it is applied is back in 1937, and it required him then to make all of his purchases, and your Honor will recall that these [fol. 3143] distributors or bulk plant operators subsequently became the TBA distributors for the defendant. Now, paragraph 21 of Exhibit 6 is interesting, because it requires the distributor to accept and pay all unemployment taxes, and any taxes for Social Security, or of that type, that might be imposed on him under the law.

Of course, we appreciate that at the time this agreement was made that Social Security, and that type of thing, had just begun to come into effect, so that the ultimate obligation of who was to pay that and under what cir-

cumstances those taxes were to be paid had not at that time been determined.

Now, Exhibit 6-A is the commission agent's agreement that was first used in October, of 1937. Here again paragraph I says that the title to all of the petroleum products which he handles shall remain in the defendant. Paragraph 10 says that he shall deduct, that is, he shall report to the defendant for any unemployment obligations under the Unemployment Tax laws, Social Security law, and so forth.

We now come to Government's 6-D, the commission agent's agreement, which the government submits is important. Paragraph 3 thereof specifically makes this commission agent an independent businessman, and even though the agent is still handling the defendant's products on a consignment basis, with title remaining in the defendant, paragraph 3 makes him, under the written provisions of [fol. 3144] that agreement, an independent businessman. And under paragraph 7 he accepts the exclusive liability for all age pension laws, unemployment taxes, Social Security, Industrial Compensation, and so forth.

In other words, if your Honor please, I believe that is of import because in this case that will be the defendant's defense, at least on the L-O type of outlet. We have here a situation where the defendant retains control and title of the property which the agent handles, and yet in spite of that the defendant charges him and makes him an independant businessman.

The Court: You are talking about the distributor?

Mr. Dixon: I am talking about the commission agent.

The Court: The commission agent?

Mr. Dixon: That is right.

The Court: Not the L-O operator.

Mr. Dixon: Not the L-O operator.

The Court: You are talking about the intermediary between the company and the L-O operator.

Mr. Dixon: That is right, your Honor. In other words, it is the commission agent who makes the delivery of the petroleum products to the dealers, and in many instances handles the TBA sales, and so forth, and distributes those products to the dealers. But I comment on it in passing

because we do believe it is of some significance as related [fol. 3145] to the defense raised here by the defendant, that the L-O operator is not an independent businessman. The government, of course, contends that he is.

The commission tank salesman, Exhibit 6-E, is a little different. Title to the products which he handles is still retained by the defendant until sold, and this exhibit provides that the defendant may pay and deduct unemployment taxes for this type of an agent.

So, insofar as the written forms of the agreements are concerned, we submit that they clearly show an intention on the part of this defendant to completely tie up the markets, or the purchaser of the products under the sales agreement with the defendant, so that he is not able, at least not until after your Honor's decision, when the changes were made in the sales contract and the painting contract that I have referred to, to acquire any petroleum products from any other source than the defendant.

Now, with that background let us briefly see, coming back to the Standard case, what the situation was in that case,, with reference to the written contracts. Your Honor will recall that in the Standard case there were 1800 subleases, that is, they were leases in which Standard turned over the property to the dealer under a written form of lease. That lease was generally combined with another type of written arrangement known as the dealer and the [fol. 3146] dealer TBA type of arrangement, depending upon whether it was to be 100 per cent all the way down the line for everything sold in that outlet, or whether it was to be merely 100 per cent as to petroleum products.

Now, the sublease, however,—there, if the court please, may I correct the record. That was a sublease from Standard to the operator that I am talking about. There were 1800 of these subleases. That type of sublease was generally for a specified term, had a specified rental, and provided that the lessee should only handle Standard Oil petroleum products. As I have suggested, it was combined necessarily with the TBA dealer type of arrangement, to extend that obligation to automotive accessories, as well as to petroleum products.

Now, there were other types of arrangements, however,

in the Standard case, which I believe are somewhat comparable to those in the instant case, but before I go into that I should perhaps mention that the record in the Standard case shows that there were over 1,000 company-operated outlets, which were not involved in that case.

In other words, Standard had through Standard Stations itself directly operated and sold its petroleum products and other products to the retail purchasers thereof through over 1,000 such outlets in the territory involved. There are no such stations involved in the instant case because the [fol. 3147] testimony is clear that Richfield does not operate itself a single retail outlet. In other words, there are no Richfield-operated outlets, as such, in this case, as there were 1,000 of such outlets, or more, in the Standard case.

The Court: That is in the sense that they are operated through employees of Richfield. The defendant contends that to all intents and purposes L-O stations are company-operated stations here.

Mr. Dixon: Yes, I understand the contention of the defendant, your Honor. But I am pointing out the distinction between the Standard and the instant case in that respect.

The Court: That is right.

Mr. Dixon: Now, it may be——

The Court: The stations had different names and the stations in the Standard case that we were concerned with were the Chevron stations.

Mr. Dixon: That is right, your Honor.

The Court: And the color was different, the name was different, and the insignia were different. They had an Army chevron of an old time sergeant, and it appealed to me, because that was as high as I ever got in the Army. But the Standard Stations were the regular red, white and blue stations, which were operated through employees of the company. Of course, not that Standard conceded any dif- [fol. 3148] ferent rule, or they would not have fought the case to the Supreme Court. They, too, contended that the relationship was such as to permit them to control the outlet, and that is the chief problem to which the evidence in the case was directed in that case.

Mr. Dixon: Now, I said, of course, the legal distinction

which the defendant endeavors to make, as I understand, is that the L-O type of station is the same, in effect, as the Standard Stations type of station in the Standard case, which was not subject to any of the provisions of the decree which your Honor entered, and which was not involved.

The Court: We have to decide, of course, what it is, and the comparison between these stations and the Standard Stations is helpful, because in that case there was established law which has the approval of the higher court, and the portion of it which was not passed on by the Supreme Court has my approval, because I still stand behind the opinion I wrote in that case. Ultimately we have to decide the problem on the basis of the characterizations of these various outlets, as they are made out by the record, and, as I said before, when I hinted, and you accepted the hint, that perhaps in view of the admissions of the defendant there was no need for too much repetition of testimony in regard to the character of the L-O stations, that, in the last analysis, the defendant admits the absolute control [fol. 3149] of the outlet. In other words, their plea as to that is what I might call—let me see. You come from Missouri?

Mr. Dixon: From Ohio.

The Court: Or from an old common law state? No, Ohio is not a common law state, and I didn't know which of those middle western states it was. But you remember studying your pleadings of confession or avoidance. In other words, they say, "We admit control. We tell them what to do. We can fire them in a minute, on any excuse of one kind or another. We may fire him because he doesn't keep his station clean, or because he has one can of Quaker State there, instead of having Richfield. But we insist that he is not an independent businessman. We haven't given him a name yet, but he is, to all intents and purposes, running the station as our agent. He has no interest in the good will that he builds up. We can destroy it in 24 hours, and we can destroy his property values by saying to him to take his junk out of the station, except such as we tell the man we choose to take. We will not recognize any man he recommends, even though the man would give him $5,000 or $6,000."

Now, what I am doing in a hurry-up fashion is taking some of the highlights that stand uncontradicted here as to what was done with these stations. So they say, "We admit we can do that, and the result is he is just like a serf [fol. 3150] under the old limited tenures under feudal law, he has it by our sufferance, and we can put him out in 24 hours. We can tell him to get out of here, and we will have another man in in 24 hours, or we can tell him he can stay a day or two. Or we can say, 'You can find a place to hide those things in your garage or under your wife's bed.'"

Now, that is an extreme statement, but all of those matters are substantiated by facts in the record, facts which have not been successfully contradicted, so that the problem before the court as to those stations is very simple: Is that relationship a relationship that has the characteristics of agency, or does it have more of the other?

Now, as I say, we must get away from the tyranny of labels. We must remember the admonition of Mr. Justice Douglas that you cannot judge by what technical terms lawyers put in contracts, but by what relationship exists, and it may well be that in this case we may have to do what we do in administrative procedures. For instance, under the O.P.A. regulations we were confronted with relations or with structures. For instance, in one case you may be confronted with an apartment-hotel, which is a departure from the old-fashioned apartment house and a hotel. It has the characteristics of both. Then we adopt a test which we call the dominant test, and by that test we see if it has more of the characteristics of one than of the other. It may be [fol. 3151] necessary in this particular case to do that, in determining it, and, of course, if you apply it, it works both ways. It depends on which you consider to be the dominant and which you consider the subservient.

For instance, counsel brush aside the fact that the man is responsible for Social Security, that he pays his own wages, that all his losses are his own except such as if a lady slips on a banana peel, and lands in the Federal Court, as was said on one occasion, and sues them for maintaining the premises, they are responsible. But they say that as to his employees he has to pay them and has to carry them under

the Social Security law, that they do not carry them under the Social Security number or the State Employers' Liability law, that that does not apply to them. They brush that aside and say that those things do not matter, because ultimately he is not an independent businessman because he has no good will. So it becomes a question of law utimately: Which is the more important in the relationship?

[fol. 3152] Is it the name that just describes what they use, "an independent businessman" that ought to determine, or the question of rights and obligations which have accrued? Is it the fact that he has no good will? Is that to dominate? Is it the fact that this man has so many obligations that when you put him out you can break him, you can break him as happened to DeLonge? You can actually break the man and deprive him of any good will. Which of these incidents determine the relationship?

So it seems to me that so far as the L-O question is concerned, it is merely a question of law for me to determine as to what that relationship is.

Does it have the indicia of independence so that the man is an independent operator despite the fact that his relationship is terminable at will, bearing this in mind, that even tenancies at will, so long as we are going into tenures, land tenures. We bear this in mind, and that is why I brought out that old decision of mine in the Owl case, written 14 years ago, that even tenancies at will, you see, are tenancies nonetheless.

So that in analyzing them we get away from the old categories in that Owl case, the Schlesinger matter, none of the four categories which characterize tenancies were present. And if I had been case-bound by feudal law and the law of tenancy of England, I could not have found that way. But [fol. 3153] I struck out a new path. I said: Listen, we are living in a new world and that is of a different character. That is why they teach that in law schools. They teach that case in law schools. It is in at least four books relating to relationship, because I cancelled the constant characteristic of American judges and English judges under our pragmatic system to take old phrases of law and adapt them to new conditions. And where I found, as I did there, that a relationship existed of landlord and tenant, I did not bother that it did not conform to Blackstone's defini-

tion of "landlord and tenant." It is a landlord and tenant of 20th century stock.

And that is the problem here. I have to determine by the incidences—that is a good word—of the relationship what this relationship is. And in doing so I won't be bound by a phraseology, whether used by Mr. Justice Frankfurter, whether used by the attorneys for the defense, or whether used by you.

I will have to determine whether the relationship is the same as that of an ordinary agency which makes them maybe the operators of the agent, or whether it is of different characteristic.

So I will have to weigh the things that he is bound to do by what they can do to him, and determine which of these characteristics are more dominant, and out of that determi-[fol. 3154] nation will come a determination whether they operate these stations and they have a right to tell them what to put in or what not to put in, or whether he operates the station under rather onerous burdens that they impose upon him and without the acceptance of which he cannot deal with them.

So that, to my mind, is the problem insofar as the L-O stations are concerned. It is a legal problem.

Mr. Dixon: Your Honor has made a division, I think, in the course of your remarks in passing on the situation here. And I may say in a few words that it is the contention of the Government—and this is argument in substance—that the dominant characteristics, borrowing a word that your Honor has used, that runs through all three types of arrangement is that of a buyer and seller of products, and that that——

The Court: I am not talking about the other two groups. I am trying to place myself for the present upon the premise adopted by the defendant that there are distinctive phases of this L-O relationship which do not appear as to the others. My idea is merely to use Mr. Justice Cardozo's famous words, "to canalize the discussion," you see, if I possibly can. We will get to the others later on.

Mr. Dixon: I think that has been very helpful, your Honor. And if I may go back to the Standard Oil case again—and I go back to it because I believe the only difference in fact between the two cases and the evidence in

[fol. 3155] the two cases is that in the Standard case they had put the arrangement in writing that the defendant is here obliged to apply to the L-O type of stations. That is the only difference, in our judgment.

In other words, in the Standard case, for example, they owned the fees on many of the outlets that were leased to the dealers there, the same as the defendant owns the fee of some of the L-O stations that they have subleased under 542 to the L-O operator.

Standard, for example, owned 110 of the pieces of property that it had leased, and of those 110 had given subleases to 23 dealers and no lease at all, merely an occupation of the premises at will, of 87 of those type of outlets.

In other words, if the defendant here claims that this operator was a tenant at will, well, in the Standard case we had that type of arrangement. That was one of the many types of arrangement in the Standard case, and it apparently just so happens that the defendant in this case has adopted one of the arrangements that was in use in the Standard case and has endeavored to distinguish it legally because of the position and the argument which they have raised concerning the L-O type of operators.

I just want to point out, first, that in the Standard case that type of outlet, identically the same except Standard [fol. 3156] owned the property, owned the fee and they had some of these operators in there without any lease at all, they were just there, perhaps, as a mere licensee, you might say, not at will—they had 87 which had entered into this type of arrangement of exclusive dealing in Standard Oil products, and Standard had leased 4,944 stations.

In other words, of the approximately 6,000 outlets that were involved in that case, pretty close to 5,000 of them Standard had actually subleased or leased. Of that number they subleased 1,775, your Honor will recall. In other words, they actually entered into a form of sublease of the type exemplified by the Government's Exhibit 5 in the Standard case. They had 1,775 of those subleases, and in that particular type of transaction the sublease required in writing that the lessee buy all of his petroleum products from Standard, and that he could not handle anything else on the premises.

In the instant case, insofar as the L-O station is con-

cerned there is nothing in the written lease but it is all done orally. They tell the dealer, regardless of the lease. I mean there is nothing in there about buying or selling anything from this defendant, as your Honor knows. It is all done orally. But in the Standard case there were 2,169 outlets that Standard had under lease with entire requirements contracts of some type, written or oral.

In other words, pretty nearly 5,000 stations that were [fol. 3157] of that category in the Standard case are comparable to the L-O and the 3-C type of arrangement here, and certainly insofar as the effect is concerned it is the same in both cases.

The Standard had an exclusive dealing contract only with 1,143 dealers. That is like the 337 type of arrangement. The dealer was subject to that kind of arrangement, had to buy all of his products from Standard. He did not have a lease from Standard and Standard did not have anything to say about the property at all. As your Honor will recall in the Standard case, they got an operator, went in under that kind of arrangement and painted the station, as did the defendant in many instances in this case, represented by a written paint contract. But they did the same thing as the defendant did in this case and the purpose of the arrangement was the same as the defendant had in mind in the instant case and it worked the same in both cases.

So that if we compare the arrangement—and there were many more arrangements of a different type involved in the Standard case than are involved here. They only had three here in this case. They had three types of arrangement. In the Standard case we had as many as six or seven and we had some, as your Honor knows, that were entirely oral, the uncontracted outlets, which are not involved in this case.

If we examine the written contracts that were used in the Standard case, we find the same provisions running all [fol. 3158] through them, either in written form in the written sales contract in this case, or as are expressed through the oral arrangement applicable to the L-O operator.

For example, the dealer agreement Exhibit 1, the dealer had to buy all of his requirements at the outlet that he

was operating, and the company, if it furnished any equipment, could remove under paragraph 5 anything that it put on the premises at any time.

Well, that certainly is what is running through many of the provisions of the subleases that I have described and analyzed in going into the various types of written arrangement before the court in this case. The petroleum products and equipment agreement in the Standard case, that is Exhibit 3, the dealer bought all of his requirements of petroleum and accessory products at the outlet which he was operating. The Standard, under paragraph 4, agreed to install some equipment, and under paragraph 5 the dealer pays for the use of the equipment, comparable in some respects to a lease or a loan of equipment. And Standard, under paragraph "C" could remove that equipment at any time. That was the provision comparable to those that are in use either orally in the L-O type of arrangement here through the pressure they could bring to bear on the operator, or in the written provisions of the leases and sales contracts that we have analyzed.

The dealer TBA arrangement, Government Exhibit 4 in [fol. 3159] the Standard case, covered, as I suggested in paragraphs 1 and 2, both petroleum and TBA products in writing.

Standard could remove any equipment, etc., that they loaned or put on the premises at any time the agreement was cancelled.

And so, as we compare these written agreements in the Standard case with both the written and the evidence on the oral arrangements in the instant case, I submit to your Honor that there is no substantial difference between the arrangements and contracts that were involved in the Standard case and those involved in the instant case, and that is regardless of the argument of the L-O type of outlet being in a different category.

The Court: Go ahead.

Mr. Dixon: Certainly, your Honor.

The Court: I thought it was a good stopping point to take a recess.

Mr. Dixon: Whatever you say, your Honor. I think it is.

The Court: Yes, let us take a short recess.

(Short recess.)

Mr. Dixon: We come now to a discussion of the oral testimony which was offered by the Government in support of the charges made in the complaint. The Government presented some 67 witnesses to the court, of which 15 of them were either associated with the defendant or had previously, with testifying, been associated in some capacity with the defendant.

[fol. 3160] The Government also offered the testimony of some 28 dealers, of which a substantial number of them were in the L-O category and the balance were in the 337 and the 3-C types of arrangement.

The Government also offered the testimony of some 24 suppliers who testified concerning the attempts made to sell their products, both petroleum products and automotive accessories, to the various types of outlets involved in this case.

I submit that the evidence given by the witnesses clearly shows the restraint in operations, the source of the restraint, and the effects of the restraint complained of on the interstate commerce described in the complaint.

Let us rather briefly, if we may, refer to some of the testimony of some of these witnesses. I am sure your Honor is familiar with all of it but I am going to try to briefly highlight what we regard as some of the perhaps more important parts of the testimony given by some of these witnesses. There was, you will recall, the testimony of Mr. Bradford, the former employee and district supervisor of the defendant. He testified generally concerning the operations of the defendant, and I think one of the significant things that he testified to is recorded on page 830 of the record, where he was asked the question:

> "Were you under any instructions to accept [fol. 3161] 3-C deals except on 100 per cent basis, that is, that they deal only in Richfield products 100 per cent?"
>
> His answer was:
>
> "They had to be 100 per cent, as far as I knew."

I think that does describe generally the effect of the testimony, the substance of it with reference to those sta-

tions as exemplified by the witnesses which we will comment on and the written provisions of the contracts that we have previously analyzed as applicable to that type of outlet.

This witness also testified that he told many dealers to move competitive signs, and that among the practices of the company they permitted non-complying L-O dealers to remain in the outlet only until they could find somebody else to take over the outlet.

In other words, I believe that is of import, your Honor, because we start in the L.O station with a clear lease. The Government submits there cannot be any question but what that is a lease that has the legal effect in every respect of turning over this property to the dealer and the operator. And accompanying that, as we have contended, of course, is this oral arrangement dealing with the sale of the products, the contract and understanding to purchase all the requirements of the dealer at that particular outlet. The term of the lease on the face of it clearly contemplates, we submit, [fol. 3162] a yearly arrangement, because it provides how much the rental shall be there on a monthly basis over a period of years, starting with a minimum monthly rental and then thereafter a one-cent gallonage basis. Some of these leases, as your Honor knows, contained only a stipulated rental. For example, a flat rental without this one-cent overage was contained in the Edgar & Bauer leases. So that we have a variety of situations even on the rental provisions in this L-O type of arrangement. But when the defendant had decided that there was a breach of this arrangement with the operator and he was not complying with the requirement that they buy all of the petroleum products and oils and all of the automotive accessories that were sold from that outlet from the defendant, then there was put in motion to get rid of that operator and, as your Honor knows, the operator was not advised at the time of that decision.

The testimony in this case shows, from the defendant, that once they had decided that the operator was to go, he was not advised of it until they had found somebody else, and then the sword of Damocles being over his head, the cord was cut and it dropped and the 24-hour notice was

served. This witness Bradford testified concerning that, and he testified to the practice of the company, and he, in fact, served or caused to be served one of the notices on one of the dealers, Mr. Edgar.

[fol. 3163] He further testified as part of the practice they would always try to get a mutual cancellation first from the dealer, and it is in the record here with reference to some of the dealers that they did sign that mutual cancellation form which is contained in and is a part of the record as the Exhibit No. 11.

But failing in that—and the evidence shows that some dealers did not want to sign that cancellation—then came the 24-hour notice, Exhibit 13, in which of course the dealer was put out in the manner and the method with which your Honor is thoroughly familiar.

This witness also testified that if a 337 dealer broke his contract, the sales contract, that the defendant would move in and collect under the painting arrangement. So that as far as the 337 dealer was concerned, unless he complied in every respect with the provisions of the sales contract, the penalty he suffered was to pay for the painting which was done to a station which, of course, obviously would have a persuasive effect on any dealer.

There are other witnesses of the defendant, Mr. Shewbridge, a merchandiser, who gave testimony. He was, your Honor recalls, from Seattle, and he testified that he was told to tell the dealer to get rid of competitive oils or to be checked out.

In other words, under the unwritten arrangement appli-

[fol. 3164] cable to the L-O dealer if the dealer did not comply with the contract or arrangement to buy all of the products exclusively from the defendant, as your Honor already indicated, he would be checked out. But the first move—and this witness Shewbridge testified to it also—was to try to get the termination mutual cancellation arrangement first, and then failing in that, to move in with the 24-hour cancellation clause.

Mr. Weston, a former merchandiser or merchandiser from Seattle, who broke in some of the dealers in the L-O stations, testified that as part of the arrangement he would impress on him that the dealer was an independent business-

man. It is true that the evidence shows that it was subject to these qualifications of compliance, but I think there cannot be any real question as to that. And when it comes to argue the various facts and the legal effect of those facts, I think we can support that and will support that conclusion that these dealers were independent businessmen. But here this witness testified that in breaking them in at the L-O stations he would impress on them that they were.

And then, of course, he gave the usual testimony to the effect that no off-brand merchandise was to be handled at the L-O outlet and that he had told some dealers to get it out, as they knew what the consequences would be.

And there is Mr. Pitts, formerly with the defendant. [fol. 3165] He was a TBA distributor, and both he and Mr. Gates, formerly with the defendant, testified that many of the dealers wanted to handle competitive products, that is, products competitive to those that were sponsored by Richfield.

[fol. 3166] In other words, the desire of the independent dealer, whether he was an L-O dealer or whatever you want to call him under the 337 or 3-C arrangement, in his selling and carrying out the program of Richfield, he found that desire there, and the market there, if the court please, which was closed off by these arrangements.

Then there was Mr. Duarte, a former commission bulk plant operator, and he testified concerning the 337 painting agreement, and to the effect, in the record at page 319, that that agreement meant that nothing but the defendant's products were to be handled at the 337 outlet.

Then we had Mr. Scollard, the salesman for the defendant, and your Honor knows that the salesman handled only or dealt only with the 337 and the 3-C outlets. This witness, at page 976 of the record, testified that the defendant was quite strict to see that just approved merchandise was handled at the outlets.

So that was the general proposition and intention of the arrangements made, whether they were written or oral, with reference to the three types of outlets, from the brief summary of some of the witnesses who have been and

were associated with the defendant in carrying out this program.

Now, coming to some of the dealer testimony we find, first, that all of these dealers had investments, as they called it, varying anywhere from $1500 to Mr. Pearse, who [fol. 3167] said he had stock in addition to that of $4,500 to $5,000,—but from $1500 up to that which Mr. Hurd testified to, in the amount of $8,000. So all of these operators had an investment and paid out money to buy products, which they, in turn, resold at the station outlet, or put into equipment which was used in the operation of the property leased to them, or which they had themselves under a 337 arrangement, or which they owned without any lease at all from the defendant under the 3-C arrangement, to enable them to carry on their business.

Now, this witness, Mr. Pearse, your Honor will recall, testified that his station was searched by the defendant at a time, and even though he had a demand for competitive products, that he was told to get rid of them, and he was told to remove the oil that he had on his premises or he would be canceled out, and to remove the signs, and that finally he was asked to sign a release, which he did. Then, when the inventory was sold to the operator which the defendant had secured, your Honor will recall he referred to that transaction as really an auction, and that the new operator said he didn't want anything in one of the rooms there, and to just take it all out, so that was all, of course, that Pearse could do.

Then Mr. Mills' testimony is rather interesting, because it deals with a dealer who had been operating an outlet for a number of years. This witness shows what happened [fol. 3168] when the decision was made by the defendant to change over the L-O type of outlet from a six months' basis to a 24-hour basis. And we direct your Honor's attention, particularly, in this connection to the Series 10 exhibits, which show the plea that was made by this witness and even many of the representatives of the defendant to their superiors to enable this particular operator to continue on some basis, as he had in the past, with a term lease. And, of course, the net result was that he had to comply, even though he had actually enabled the defendant in this case to get this outlet, which he had previously had,

as an L-O outlet, and even though he had an investment in that business and had built it up. But it shows the policy and it shows the intention, if the court please, and that is why we believe it is significant, of this defendant to monopolize and control every one of these outlets 100 per cent, and that, as we shall argue in the legal part of the argument, constitutes, in our opinion, the vice of this entire arrangement, and which makes it a violation of both the Sherman and the Clayton Acts.

Then there is the testimony of Mr. Moore. He was a 3-C dealer, from Medford, Oregon. His testimony shows that he was told that he should handle only approved products, that he had competitive signs on his property and was told to take them down. And he also testified that he could make more money selling competitive oils, but he gave up selling them because of the arrangement, and [fol. 3169] took down the competitive signs. The new sales contract was presented to him, your Honor will recall, in February, 1950, and he finally signed it, and had been operating under that arrangement by direct lease now from the defendant. But here we have a situation which gives in background the 3-C type of arrangement and operation, and the restrictive provision in the sales contract which the 3-C operator entered into, which required him, your Honor will recall, until after your decision in the Standard case to handle petroleum products on an exclusive basis. Of course, after that it was switched over, as your Honor knows, to a maximum, minimum arrangement, but the testimony of Mr. King in that respect is that from the time they started the no-split-pump policy back in 1938, after Government Exhibit 9 was circulated, I mean that policy was made known, that the effect of all of these sales contracts has been that, regardless of the maximum-minimum provision, they have been 100 per cent Richfield petroleum products. The government contends that here is an example, in the testimony of Mr. Moore, operating under the 3-C arrangement, and with the contract then changed over, with no effect at all, and he continued with the same arrangement of purchasing and requiring to purchase all of the petroleum products handled at that outlet.

Then Mr. Edgar was a good witness. He testified con-
[fol. 3170] cerning the termination procedure. He was the one, your Honor will recall, was checked out or terminated by Mr. Bradford. This witness again, like all the others, had an investment of around $2,500 in equipment and products. He testified that the customers wanted other oils and competitive products, and that he could make more money by handling tires other than those secured from the defendant, and that Mr. Bradford told him if the competitive oil was not removed, he would be canceled out, and that he was subsequently canceled out; that previously he had been loaded up with battery cables by the distributor, the TBA distributor of the defendant and, of course, when he was canceled out, the same story was heard all over again as applied to these other witnesses, that he had to take his with him, pack up his bag and baggage, and do as best he could with those products which the incoming dealer did not want to purchase from him at the station.

Then Mr. Hurst testified. He was from Portland. This witness was not told anything at the time he went into the station about the exclusive handling of the products. That was his testimony, your Honor will recall, and I believe these stories because the whole of this L-O arrangement is oral. There is obviously nothing in writing, so that, in the last analysis, it depends entirely upon what the incoming operator or dealer is told by whatever representative is checking him in at that time. He was not told about this exclusive dealing policy until about a month
[fol. 3171] later, and then the same testimony applies as applies to the others, that this witness could buy products cheaper elsewhere than he could from the defendant, and one of the examples was that he could buy the same spark plugs for 29 cents that he paid 36 cents for to the distributor for the defendant. He was also told, the testimony shows, when he was looking for a station—and I believe this may have some bearing on the arrangement—that this station was for sale. In other words, it was a buying and selling arrangement, which it obviously is. But from the point of view of the defendant, the station was for sale and a sale implies the transfer of some products and the buying

and selling of something, and an investment. That is precisely what Mr. Gates testified to, and I think he describes his investment in this particular station as being around $1500.

Then we have the witness Colmery. He is the one who operated under a 3-C type of arrangement, your Honor, and I think it is of import in that it shows the long term nature of that type of arrangement. This started out originally as a 20-year lease and contract arrangement. It was subsequently reduced as time went on in years, and Exhibits 17 and 18 will show the arrangement covering the 20-year period and the subsequent reduction to, I believe, it finally wound up with around a 10-year period. But the whole operation was a 20-year period, and continues to be one. [fol. 3172] This witness also testified as to the change-over in the maximum and minimum provision of the sales contract, which the defendant changed, your Honor will recall, after your decision in 1948, and how it was presented to him, with the figures already there, and your Honor knows how those figures were determined by the defendant. But here again we see that the effect and the intention of that maximum-minimum provision was clearly to make that station, and in fact it was, a 100 per cent Richfield petroleum products outlet, under that type of a contract.

Then we have Mr. McRae. I don't know as your Honor recalls him, but I commend his testimony to your consideration because this witness, I believe, had pretty nearly every type of an arrangement that was invoked with the defendant. He started out as a 337 operator, and finally wound up as an L-O operator. Those exhibits, your Honor, are Exhibits 19 and 19-A on the McRae testimony. That witness testified, among other things, to the fact that when he was a 337 operator he wanted to handle competitive petroleum products and gasoline, and he was told by the representative of the defendant that that was out, that it had to be 100 per cent Richfield or else there was no Richfield gasoline sold.

Now, that corroborates and supports the testimony in [fol. 3173] this record, if it needs support, concerning that policy, which was made of record, shall we say in writing, by the Dinkins' memorandum back in Government's

Exhibit 9, and here it is in operation, and as the testimony of the supervisor for the Arizona district—I have forgotten his name—I believe it was Mr. Nicholson, and of Mr. Bradford, who also testified when he became supervisor that the split-pump situation was cleaned up in this area.

In other words, here we have McRae at the dealer level trying to get competitive gasoline being told by the defendant that they did not sell anybody under those circumstances, that it had to be 100 per cent, and as your Honor knows, the record clearly shows that insofar as gasoline was concerned it had been 100 per cent at all of the outlets during the entire period of the time, and is so at the present time.

[fol. 3174] Then I think the McRae testimony is perhaps also of some import, because it shows that this dealer under an L-O type of arrangement, your Honor will recall, was called into the armed services. He was told by the defendant that he could not continue to have that station under those circumstances, but the record shows that he did and that he did not surrender that station until sometime in 1946.

So this control which I choose to call a sword of Damocles hanging over the head of all of these dealers does not add up to changing the relationship between the parties at all. It is merely typical of the exercise of a monopoly power, which we will discuss when we get to the legal part of the argument, which is exercised just as illegally as if it was a national monopoly under Section 2 of the Sherman Act.

Mr. DeLonge's testimony——

The Court: I think we had better stop at that. I do not want to run through the whole noon hour but will give you a rest. We will take a recess until 2:00 o'clock.

Mr. Dixon: All right, your Honor.

(Whereupon, a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, June 5, 1951.)

[fol. 3175] Los Angeles, California,
Tuesday, June 5, 1951. 2:00 P. M.

The Court: All right, Mr. Dixon.

Mr. Dixon: Your Honor will recall the testimony of the witness DeLonge, who had the second best station in gallonage in his area, and Exhibit 20-A relates to that particular witness. The record shows that in this particular situation, your Honor will recall, there was some damage to some of the equipment which the defendant had refused to repair, and which the witness or operator was forced to repair if he wished to carry on that phase of his business.

We submit that this clearly shows the control over the premises which vested in the operator of the L-O outlet, and the fact that he was operating at that location leased to him his own particular business.

Now, your Honor will recall that this witness was told that he had better get rid of some competitive oils, because the representative of the defendant would hate to see him lose his business over any oil.

Of, course, your Honor knows what happened. He did lose the business, and he was subsequently sold out—I mean the inventory, and so on, was sold out to someone whom the defendant secured, rather than to one whom the operator had secured, and concerning whom, if he had made his arrangement, he would probably have been able to salvage some of his investment in the premises.

[fol. 3176] Now, in connection with this 24-hour arrangement, as I suggested in commenting on the testimony of one of the other witnesses, the defendant, at the time the L-O operator is given possession of the premises, sometimes when questions were asked did assure him that the occupancy may be for an extended period of time in spite of this provision.

For example, the witness Ellena at Reno inquired about the provision and asked Mr. Reed, the representative of the defendant, who was concluding the arrangements in turning over the property to him, and he was told by Reed, "Don't worry about it. Richfield Oil Company is a good company. You don't have to worry about that 24-hour lease."

That witness was subsequently checked out, as your

Honor knows, for failure to comply with the provisions of the oral arrangement that he should handle the defendant's products on an exclusive basis.

Another witness, Mr. Smith, from Los Angeles, inquired about the 24-hour termination clause, and he was told by Mr. White, representing the defendant, "It was a thing I didn't especially need to worry about. He said that they didn't often write an operator out," and the provision was discussed with Mr. Phelps at the defendant company, and he stated, "As long as I play ball with Richfield that I would be all right, that they had a ground lease for 10 years, with [fol. 3177] a 5-year option, and that in his opinion I would be in there for 15 years."

[fol. 3178] In other words, I mention this type of testimony, your Honor, to indicate that the L-O type of arrangement was in fact, as it is on the face of the written document, a lease and transfer of possession over to the lessee and that as part of this transaction there is this oral arrangement or contract or understanding that is entered into at that time whereby the lessee agrees to purchase all of his requirements of petroleum and TBA products from or through the defendant.

Passing to the witness Ogburn, your Honor will recall that that witness was a 3-C operator and that witness testified to the effect that no competitive signs were permitted at his outlet, and that the competitive oils which he handled a his outlet were delivered to his residence.

Now, there are a couple of witnesses that I think we might mention in passing which deal with the manner and method of check-out as far as notice is concerned. This witness Ellena that I mentioned, who had the investment of around $3,000 and whose rent was $50 a month minimum and a cent a gallon above all over 5,000 gallons, was one of the witnesses, you will recall, that was terminated, and it was done in the manner of—well, here is his testimony, page 1264 of the record:

> "McGowan came into my station one day and he hung around all day. So I asked him, you know, what was wrong. And he never said nothing. So he came the [fol. 3179] following day and he came the following day and about the fourth I asked him what was wrong.

So he asked me if I would go for a cup of coffee with him. So I went downtown and got a cup of coffee with him. And he said, 'Mr. Hunt told me to tell you that you are going to have to leave within 24 hours.'

"Q. Did Mr. McGowan say anything else at that time in explanation of the news he had for you?

"A. Well, Mr. McGowan told me that I was one of the best operators in Reno, Nevada, that I kept my station clean, took care of my customers, and that he couldn't help it. It was a damn, dirty shame to pull a trick like that on me, that he was just taking orders from Mr. Hunt."

A cup of coffee method, of course, was comparable probably to giving him a drink of hemlock because it had the same effect and he was asked to partake of that because he had not complied with the arrangement made either at the time of the lease or subsequent to it that he was to purchase all of his petroleum and TBA products from or through the defendant.

And then, of course, Mr. Wagner, another witness your Honor will recall, the same thing happened to him and he went right up to Mr. King and tried to get some relief, but with the same result.

The change-over under the 3-C arrangement type of sales [fol. 3180] contract is further exemplified by the testimony of Mr. Strable, Exhibits 14 through 14-D, and the testimony there was, your Honor will recall, that those documents were brought in to him, he was asked to sign them, the maximum and the minimum figures were already there, and he finally signed and executed the documents.

So that, hunting through the testimony of all of the dealers, of the three different types of outlets, we find that either expressed in writing or oral requirement is the exclusive dealing provision that requires the operators of each one of those types of outlets to purchase all of his petroleum products from the defendant, and to purchase the TBA accessories, particularly in the L-O type of station, from the defendant and, perhaps, in a lesser degree because of the lesser ability on the part of the defendant to apply the pressure to the 3-C and to the 337 type of outlet from or through the defendant.

But the effect of this arrangement is further shown, that is, the closing off, the locking off of this market from all competition, through the testimony of the suppliers. Your Honor may recall Mr. Carlson, one of the suppliers. He testified that he was selling about $150 worth of TBA products to one of the dealers when he was operating another outlet, that then that dealer became an L-O operator and immediately, without any disagreement with Mr. Carlson and without any dissatisfaction with the product that Carlson was selling that dealer, those purchases dropped off to not [fol. 3181] more than $5 to $10 a month, and those were limited to items which the operator could not secure under or through the defendant.

Mr. Brewington, another supplier.

The Court: Wouldn't that justify an inference that there may have been a distinction between that type of operation, an L-O, and the previous dealership operation?

Mr. Dixon: I think so, your Honor, yes. In other words, it certainly illustrates the restriction in effect and the way that arrangement, which is the oral arrangement, operates.

The Court: No, I did not mean that.

Mr. Dixon: I am sorry, your Honor, I did not get the question.

The Court: I thought you were arguing against yourself because, by emphasizing that this change to L-O resulted in the drop, you are emphasizing the difference between the two methods of operating, where you claim the same underlying principle is behind all.

Mr. Dixon: I am sorry, your Honor. I should have made it clear that the dealer was not operating any Richfield outlet when he was making the $150 purchases. I believe he testified that he was operating a Shell station.

The Court: Oh, yes, that is right. Yes, that is all right. It was my error.

[fol. 3182] Mr. Dixon: I am sorry. It was my fault I did not make that point clear.

I refer to that to illustrate what happens when the supplier gets a market. I mean he is selling a dealer or he is selling someone. In this case Carlson was selling the operator $150 a month or more of TBA accessories. Then the operator goes to the L-O outlet and that market is com-

pletely thereafter closed insofar as the supplier is concerned because of the Richfield arrangement.

Brewington testified to the same effect and gave specific examples. And Mr. Burris testied that the dealer told him: "Don't bother me about things that I can get from the defendant. Under this arrangement I must buy them from the defendant whether I want to or whether I would prefer to purchase them from you or not."

And then there was the supplier Brown who said that he could give the dealer better buys on tires and other products, but the dealer still could not buy from him even though they were the same items.

And the witness Behm, a supplier who happened to be present when he was trying to sell an L-O dealer and the merchandiser of the defendant was there, and he was told by the defendant's representative that if the dealer bought anything, why, Richfield would, as he put it, "lower the boom" on the dealer.

[fol. 3183] So other examples might be given, but those are at least sufficient to show the effect of the operation here, the effect of this arrangement, this exclusive dealing arrangement that is a part of the L-O transaction in closing this market to all competition from other suppliers and making it, in fact, entirely and exclusively the market of Richfield.

Now, I want to just comment briefly upon the testimony of a couple of witnesses who referred to the Standard Oil decision because, as your Honor knows, after that decision the defendant did make some changes that we have already referred to in the sales agreement, the 337 sales agreement, and the painting agreement, and also some changes were made in the 3-C type of deal.

Mr. Delucchi, who was an operator in San Francisco, testified that he had a conversation in July of 1947 with Mr. Kintano of the defendant, and told him, that is, the operator told the defendant's representative that he could now sell whatever he wanted to, "and he said I couldn't and I told him that I could because the government guaranteed that I could, and he replied, 'Oh, no, you can't. If you do, you just won't sell any more gas.'" That is at page 1360 of the record.

Then Mr. Baird, another operator at Reno—I am sorry, not an operator, but he was a supplier who was endeavoring

to sell an L-O operator on some of his products in July of [fol. 3184] 1949, and your Honor may recall that he had with him the letter which Standard had sent to its Chevron dealers as a result of that case, and the purpose of using it was to emphasize to the operator that the market was now open to competition, instead of being excluded, as it had theretofore been. And Mr. Hunt, who is the representative of the defendant, was there at the time, and he was the Richfield merchandiser, and they just laughed it off and said it didn't mean a thing.

I mention that, your Honor, of course not to point out that there is any particular significance to it, but to show and to illustrate the fact that these changes which were made in the defendant's contracts, that we have already discussed, after that decision have not in fact changed its operation or have not in any sense served to open up this market, which the government contends has been completely locked up by the type of arrangements that have been invoked by the defendant, and which are represented by the oral and written agreements that have been submitted to the court.

Now, with reference to the TBA arrangement, your Honor may recall Exhibit 8. That is a memorandum signed by Mr. Dinkins, which was sent to all of the supervisors of the three areas of the defendant, and which was directed specifically to Mr. Miller. That is of particular interest, I believe, because it not only points out the profit which the [fol. 3185] defendant reaps in this case through the TBA program and the importance that it attaches to it, but it also expresses in language that I think cannot be equaled the policy of this defendant on TBA products.

Mr. Dinkins states as follows, with reference to the TBA program, on page 2 of Government's Exhibit 8:

> "If it is a commission agent who takes no interest in TBA, then we need a new commission agent."

And the testimony in this case shows that, as some of those agents have testified, they were canceled out either because they handled other products or because they weren't complying with the Richfield arrangement. Continuing:

> "If it is a dealer who refuses to interest himself in this profitable endeavor, then it's a new dealer."

Now, Mr. Dinkins doesn't say "L-O operator" in this exhibit, your Honor. He doesn't call him an L-O operator. He says it is a new dealer if the dealer refuses to interest himself in what he calls "this profitable venture."

We submit that the evidence here shows that in many instances these dealers, whether they are 3-C, 337 or L-O operators or dealers, can make in many instances more of a profit from the purchasing of the same items from sources other than Richfield than they can by being required to and [fol. 3186] following the Richfield practice of requiring them to purchase them through the Richfield TBA distributor.

Now, the record in this case shows with reference to TBA that the defendant makes direct sales to some of these outlets, and that it makes other sales to the distributors, who are assigned the Richfield stations in those areas, without reference to whether they are L-O, 337 or 3-C. And the record also shows that this arrangement in the year 1950 netted this defendant a gross profit of over $600,000 on these operations alone.

It probably is clear, or it may be that the evidence shows that greater emphasis was placed on the L-O operator in requiring him to handle these products than perhaps could be exerted pressure-wise, at least, on the other two types of dealers, but the fact remains that in all three instances the record shows the supervision and the policing of these three outlets for the purpose of making certain that competitive products are not sold or handled in the outlets inspected or to which these three types of arrangements are applicable.

Government's Exhibit No. 30, for example, shows that the salesmen made reports even as late as the early part, as I recall it, of this year—no, it was last year, in 1950—concerning unauthorized signs in the 3-C and 337 type of outlet.

Now, just one comment concerning the policy of this de- [fol. 3187] fendant not to sell gasoline to any outlet which did not handle Richfield gasoline 100 per cent. I believe that has been pretty well established and is unrepudiated by the evidence.

The record clearly shows that this policy started back in 1938, in Government's Exhibit 9. The testimony of Mr. King and the testimony of the supervisors that I mentioned, Mr. Nicholson and Mr. Bradford, shows the operation of it in their particular territories, and the policy of the company

not to sell any outlet any Richfield products except on a 100 per cent—I mean, gasoline except on a 100 per cent basis.

The record shows a specific rejection, at the request of the witness McRae, to handle competitive gasoline other than that of the defendant.

Now, the effect of this policy is well shown by Government's Exhibit 9-A, in operation, where the exhibit shows that, "When we were in the account on a split pump basis, he averaged 13,500 gallons per month. Since we took the account over on a 100% basis on February 7th, we have averaged well above 40,000 gallons per month. Last month the gallonage was 47,726."

And then it continues: "When we were in the account on a split-pump basis our motor oil volume averaged seven gallons per month. Since we have been in on a 100% basis we have averaged over 55 gallons per month, all of which is [fol. 3188] still only a drop in the bucket compared to the account's total motor oil volume."

So the defendant's own exhibit and record shows the statement as to the effect of this 100 per cent policy on the part of Richfield, which is carried out, first, in the oral arrangement made with the L-O operator, under the 542 form of lease, by an oral contract of sale which was further carried out in the 3-C type of arrangement, by the exclusive dealing provision of the sales contract in that arrangement, which was modified after your Honor's decision in the Standard case to a maximum and minimum requirement provision, but did not change, in effect, the 100 per cent nature of the contract, and, further, by the 337 type of sales contract, where the maximum and minimum provision also operated to have the same effect.

So we come now to the question of law that may be applicable to these situations.

Before I discuss that I think it might be well to comment, in closing, on the evidence that with reference to the contention of the government that all of these operators of the three different types of outlets are in fact independent businessmen, that the defendant, we believe, have themselves recognized this fact in their advertising over the radio. The record shows, for example, that as late as 1950, February 21, 1950, this defendant in its radio advertising on February [fol. 3189] 21, 1950, March 8, 1950, and again on March 9,

company for all funds received from the sale of Richfield products. Richfield relinquishes all control to the property under this arrangement that it has, and it has elected to do so, and the arrangement is only tied in to an outlet at which the dealer resells those products.

[fol. 3193] In other words, the operator of each one of these three types of outlets is buying the product for the purpose of resale from the defendant, and it is obviously buying them on an exclusive basis under the evidence before this court.

And now, we submit that, certainly insofar as the 3-C and the 337 type of arrangement, that those provisions are applicable, that the Standard decision clearly applies.

What about the other outlet, this L-O type of outlet so-called? As to that, as your Honor has indicated, the defense appears to be that in the nature of confession and avoidance. In other words, they admit the arrangement in substance, namely, they admit that they have required the lessee under this arrangement to buy all of his products from Richfield. So, standing on that basis alone, there is no difference between the arrangement and the facts and the various types of arrangement involved in the Standard case.

But what does the defendant do with that situation? He says, "Why, yes," faced with the facts which they must admit. They say, "Yes, we have done that. Yes, we have closed off this market from competition, but we have a right to do so."

Now, let us analyze that for a moment. What is the basis of that right, if there is any? The Government contends that there can be no such right under the arrangement invoked in this case, on the basis of your Honor's ruling and [fol. 3194] affirmance of that ruling by the Supreme Court.

That requires, perhaps, a little further analysis of the factual situation relating to this arrangement. What is it?

We submit, first, that there can be no question but what this property has been definitely turned over to the lessee, the dealer, the operator, whatever he is to be called. In other words, we have here an actual lease. It is not a license. It is an actual lease. It contains the usual provisions of a lease, imposing on the lessee the obligation to keep the property in repair and the various other provisions that we

have previously discussed. It is in every sense of the term a lease. It provides for a minimum rental which is payable in advance on the first of each month, and then the additional rental that might be computed is billed to the operator after the 10th of each month after the sales at that station have been determined.

But nowhere in the written form of the lease is there anything which negatives the legal conclusion which we submit must be drawn from that document that the defendant has fully and completely turned over to the operator or the lessee or the dealer, whatever you want to call him—they have surrendered the possession of that premises to him.

What have they surrendered it to him for? They surrendered it to him for a stipulated rental, which is the usual form of arrangement in any lease where the lessee agrees to [fol. 3195] pay dollarwise for the use and occupancy of the property which is turned over or surrendered to him in the lease.

If there was no rental here, you might have an arrangement where you might say he was the licensee agent, but you do not have that arrangement, if the court please. There is a distinct arrangement here of landlord and tenant, or lessor and lessee, that is created between the defendant and every dealer or lessee under the Form 542 type of lease.

I think your Honor's decision in that respect—I mean in the Owl Drug case which you pointed out to us—clearly establishes that fact, and that there can be no question but what that was the intention and purpose of it.

So, absent anything else, absent any oral arrangement or understanding, we have clearly here the relationship of landlord and tenant and it might as well operate to that end. In other words, the lessee might handle any gasoline insofar as the written provisions of this lease are concerned and pay to the defendant on that basis, because presumably that embodies the entire arrangement between the parties. Now, you have foisted on top of that this oral arrangement, and let us pause for a moment and see what that is.

The Government submits that this arrangement can be nothing other than a contract for the purchase and sale of petroleum products and TBA products from or through the defendant. Now, the record clearly shows that that is what [fol. 3196] you have here. The operator is buying gasoline,

he is buying oil, he is buying automotive accessories from or through the defendant, and he is paying for those products to the defendant. So that this oral arrangement is obviously one of sale of products, and that is where we get into the arrangement that the Government is challenging in this case which is tied into, of course, the lease.

That arrangement requires or is in the nature of an exclusive dealing type of arrangement, clearly. I submit that there cannot be any question about that. It is indisputable. As a matter of fact the defendants contend that that is what they contend the arrangement to be.

So that we have this contract of sale which is coupled or at least worked into, but not a part of, the lease itself.

Now, what changes the arrangement? There is never any change there, if the court please, we submit, between the arrangement of the lessor and lessee, and the buyer and seller of products, as long as the lease is in effect.

The defendants have inserted this 24-hour cancellation provision into the lease itself. That does not in any sense of the term negative the legal conclusion that is inescapable that it is still a lease. And I submit that it is still a lease, even with that provision contained therein.

But what is the purpose of it? The purpose, your Honor, is no different, I submit, based on the evidence here, than [fol. 3197] the comparable provisions in the 337 and the 3-C type of arrangements which give them a five-day cancellation right to stop any further sales to the operators under those types of arrangement. The purpose of it was to put the pressure on the dealers to make them in a position to enforce the exclusive dealing type of arrangement.

In other words, this 24-hour cancellation clause is nothing more than the sanction, and I submit it is an illegal sanction when used as part of this arrangement, and the Government challenges it in every respect, that it is an illegal sanction to enforce or to enable them to enforce the illegal exclusive dealing type of contract and sales.

The Court: I do not remember at the present time, but is there in those leases the usual condition that in a bankruptcy, or if there is a levy of attachment or execution they may also terminate?

Mr. Dixon: Yes, your Honor, it is. You mean in the 542 lease?

The Court: Yes.

Mr. Dixon: The L-O lease.

The Court: Yes.

Mr. Dixon: I have forgotten now just what it is.

The Court: I am just thinking that clauses like that are contained in many leases where the lessor has a substantial interest and wants to protect himself against acts of credi- [fol. 3198] tors that might destroy that interest, in which event, of course, you have an almost immediate termination upon the happening of these contingencies. Go ahead. It is not very important.

Mr. Dixon: Yes.

The Court: Of course, the 24-hour clause had other purposes here and was broader than that.

Mr. Dixon: Yes. The Government submits that the record shows that the purpose of this 24-hour clause was not to in any sense of the term protect the defendant's property at all. In other words, the purpose of it was to enable them to force this operator or dealer to comply with the oral arrangement to buy 100 per cent from Richfield, and nothing else. The testimony shows that that is the only time that they ever enforce it or invoke it.

Of course, they might come around and say the restroom is not clean, as they did in the Standard case, and they can find some other reason for doing it, but the record here in its entirety, we submit, shows the intention and purpose of this arrangement was to give some sanction to an illegal arrangement, that illegal arrangement being the oral contract of sale entered into between the defendant and the operator on an exclusive type of deal or arrangement. That was the same sort of thing that we had in the Standard case in the uncontracted stations on the 100 per cent basis and, in a modified form, it was the same sort of thing that your [fol. 3199] Honor passed upon in the Standard case where the operator—the dealer, rather, was just put in possession of the property under a dealer and dealer TBA type of arrangement, with no lease at all.

We submit that what the Sherman Act is concerned with are two things: The purpose and intent of an act and the effect of that act. And we submit that the evidence in this case clearly shows a clearly expressed intent on the part of this defendant to control this entire market to which they

are selling their products, and that they have effectuated that purpose and intent by means of these contracts and by means particularly in the L-O type of a station with the oral arrangement which is sanctioned that is given effect by the 24-hour cancellation clause, nothing else. And when you have that kind of arrangement, with the effect such as the evidence shows to exist in this case, we submit you have an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

It would be presumptuous for me, your Honor, to go into a discussion of the purpose and intention of Congress in passing the Sherman Act. Your Honor is as familiar with that, perhaps more so, than I am. But suffice to say it was aimed at every type of restraint of an unreasonable nature.

And I submit that, coupled with the lease in written [fol. 3200] form here and the oral arrangement in the L-O type of outlet, that you have an arrangement which is illegal, and I contend is illegal per se under the Sherman Act, and it is illegal per se because the intention of the defendant to effect this restraint is clearly shown and admitted on the face of the record.

To get back to their argument, as we understand it, they say, why, this is our market. In other words, we have created this market, we built the station. We have got some money invested in this station and therefore we have a legal right to make everyone who leases from us buy all of their requirements of petroleum and TBA products from us. In the latter category the defendant does not even make them—something they do not even manufacture. They are using this outlet as a means of additional profit. After they leased it, after they surrender possession of it to the dealer, they try to emphasize this restriction on him and then try to enforce it by this sword of Damocles that is hanging over his head all the time, the 24-hour cancellation.

I submit that when you take the oral arrangement and the written lease together the picture here is complete, and it is obvious the market here is this dealer wagon. You have got a buying and selling, as you have in any market, and that is not one that Richfield has created at all.

The market here that is being restrained is the dealer's market, his right to purchase products, petroleum products [fol. 3201] that his customers want at the outlet which he

has leased and for which he is paying a rental. They come to a station, they want different kinds of oil, they want different kinds of tires, they want different kinds of other products, and they have a right to assume that that dealer there will be able to get them for them because that is his station. He has leased the property. He is paying the rent. He is paying the employees that he hires, if any, and he is spending his time there. He is not an employee of this defendant. He is not receiving a nickel from the defendant by way of pay. Every cent and every dollar that he makes he is making through the resale of some products at that outlet to the public, and that is his market.

Now, if the defendant here had chosen, as Standard Stations did, to sell to the retail market through their own outlet and operate their own outlet, that might present a different question. We would not be before your Honor on that particular question at this time.

But when they have elected, as they have in this case and as they did in the Standard case, to lease out or to surrender the possession of the property that they owned or that they leased or that they had spent some money on, to somebody else, I submit that under the Sherman Act and the Clayton Act, they cannot tie any strings of that kind to a lease of the type that they tried to do in this case. When [fol. 3202] they tried to do so, they are violating the spirit and the purpose and the intent of the Sherman Act in every respect.

In other words, what you have here is a very clever and devious device which has as its conceded purpose the monopolization of this dealer market of over $45,000,000 in the last year, 1950. And if this device, this arrangement, the lease and oil arrangement, is legal under the Sherman Act, then I say to your Honor that the spirit and purpose of that act have no account in our economy today, because this device has been one of the neatest ways of getting around the decision of this court, affirmed by the Supreme Court, that I have ever imagined would be possible under any phase of the law.

But the market here, as I said, to get back to that, is this dealer market. It is not the retail market. It is the purchases of the dealer that is most threatened here, his ability,

his right to purchase as an independent businessman the products that he sells at that station from whatever source, I submit under this kind of a lease must be impaired, and that anything that endeavors to impair it in the manner in which it has been impaired in this case by this exclusive type of oral arrangement violates not only the spirit but the intent and purpose of the Sherman Act and is illegal under that Act.

And I submit further that it is illegal per se where the [fol. 3203] intention to do so is conceded and clearly admitted as it is in this case.

Now, that this is a contract of sale I think is obvious. I am just going to refer briefly to the Standard Fashions case. Your Honor is already familiar with it. 258 U. S. 346, decided in 1922, one of the older cases. But that case held that the contract whereby the defendant agreed to purchase from complainant a stated quantity of patterns, etc., was not a contract of agency or joint venture, though it was denominated "contract of agency," but was a contract of sale.

And, as your Honor has already pointed out, we do not care what you call this arrangement. It is not what you call it that counts. It is what you have got, what you are dealing with. And the dominant characteristic of this arrangement is sale, not agency, not joint venture. What you have here is a sale, and that is the purpose of the defendant to sell its products to these dealers. It is not anything else.

The defendant is not selling its products to the consumer. It is selling them to the dealer, and that is the purpose of this arrangement.

So how can we avoid the inescapable conclusion that it is a contract of sale and not of agency, not a license but a lease.

I agree that it may be rather difficult sometimes to place [fol. 3204] these arrangements in any particular category, but we submit that that is not necessarily the test here. The test of whether you have a violation of the Sherman Act depends upon whether you have restrained commerce and restricted the market. And under the appreciable segment doctrine of the Supreme Court and of this court as applied to the Standard case, you can't foreclose a substantial market from competition. And the defendants must con-

cede that, and their only defense motion is that this is not a market that is open to competition, this is our market.

In other words, they say we have closed this as a market. Well, I do not know how they can justify that closure, when we have contracts of sales of the products involved. If it were consignments, it might possibly be so, but that is not the type of arrangement that you have in this case.

Now, those two other cases that we might briefly refer to, your Honor, on the appreciable segment doctrine, the first of those is United States versus Maryland and Virginia Milk Producers Association, 179 Fed. (2) 426, and the other is U. S. v. National City Lines, et al., 186 Fed. (2) 562, both cases affirmed by the Supreme Court. Those cases deal with the appreciable segment doctrine. It is almost in a sense, perhaps, obvious that we need not even comment on them.

The Court: The National City might have been my case if I had not transferred it.

[fol. 3205] Mr. Dixon: Yes, you got rid of that one, your Honor.

The Court: I sent you to Chicago on that one.

Mr. Dixon: But in that case the defendants said that the appreciable segment doctrine did not apply. They said you can't monopolize a market of that type throughout the country. In other words, the suppliers went in and, as your Honor knows, took over the market and excluded all competition from the National City Lines purchases. And their argument in the Court of Appeals was that you could not attempt to monopolize commerce in that manner, that the appreciable segment doctrine did not apply.

So the Court of Appeals disposed of that argument on the basis of the Yellow Cab case, on the basis which your Honor is thoroughly familiar with and, held, of course, that that was the doctrine applicable to it. In view of the changing economic conditions and situations in the country, that that was the purpose and intent and the spirit of the Sherman Act to reach that type of restraint. And where you lock off an appreciable segment of interstate commerce from all competition and close it to competition, under those cases and under the Standard decision you certainly violate Sections 1 and 3 of the Sherman and Clayton Acts.

Now, I am not going to take any more time, your Honor, to discuss the law applicable to the facts in this case.

To briefly summarize it, we submit that the appreciable [fol. 3206] segment doctrine does apply to the facts of this case, that you have an appreciable interstate market here, a segment of an interstate market in the amount of $45,000,000, that your decision of this court in the Standard case is clearly applicable to the types of arrangement, all three of them, that are involved, and which the evidence shows the defendants have put into effect in this case, and that the Standard case is a precedent in every respect for the types of arrangement that the defendant has resorted to here in this case to effectuate the restraint. And, as we analyzed those arrangements this morning, we pointed out how they could be brought, the 3-C, L-O station arrangement, and 337 type of arrangement could be brought within one of the many different types of arrangement which your Honor held were effective illegal restraint under the Sherman and Clayton Acts in the Standard case.

As I suggested, we are dealing here with a market. It is not a market that these defendants have created at all. They had turned over a property to the operator or the dealer or the lessee, and then it is from that point on it is up to the lessee or the dealer to create a market for his products. And having surrendered possession of the premises to him, we submit that they cannot impose any illegal restraint on the use to which those premises can be put where the effect of that arrangement is to accomplish the unrea- [fol. 3207] sonable restraint such as is effected in this case.

And on that basis, your Honor, we submit that this court should enter a decree in favor of the Government. We submit further that when it comes to the question of a decree, that the 24-hour provision should be specifically dealt with and that the defendant should be enjoined from cancelling this lease or any of these L-O type of leases, Form 542 leases, except for any breach of any of the written provisions of that lease. As to that, the Government is satisfied that will effectively prevent them from going in, as they have in the past, and forcing thees dealers into an abject position of serfdom where they cannot even buy anything from anyone else and cannot carry on their business in the

American way under our system of a competitive economy such as the Sherman Act was intended to protect. That in entering the decree against the defendant in this case, adequate provision should be made to make certain that what the defendants have been doing in the past in enforcing the illegal contract by calling into operation the 24-hour cancellation clause must be effectively enjoined against, and on that basis we submit that the decree should be entered in this case as called for in the complaint of the Government.

The Court: All right. We will have a short recess and then we can go on with the defendant.

(Short recess.)

[fol. 3208] The Court: All right, Mr. Paradise.

Mr. Paradise: Thank you, your Honor. If the court please, by way of introduction, I would like to mention two points first, and then discuss separately the 3-C contracts and the 337 contracts, and then end up with a discussion concerning the L-O stations.

The two points that I would like to make by way of introduction are, first, the point that I made at the opening of the case, that this case actually involves two completely separate and distinct subject-matters. One is the contracts and arrangements between Richfield and the L-O operators, and the second is the situation insofar as the independent dealers are concerned, the 337 stations and the 3-C stations.

We recognize clearly, as your Honor pointed out to us during the course of the trial, that the government's theory is that there is no difference between the two types of stations. We recognize also that the government's argument, as presented to your Honor today, lumps together and ignores the differences between the two, and actually has confused them.

In the first place, Mr. Dixon mentioned that here we have a total market of $45,000,000, and all his references to market and to foreclosure from market were as to $45,000,000. The court recognizes that is the aggregate of all three types.

Then Mr. Dixon mentions that we have foreclosed this [fol. 3209] market, referring to all three types.

All throughout the case we have tried to differentiate, for purposes of clarity, between the people in the L-O stations as operators, so we would know whom we were talking about, and to those in the independent stations as dealers, for purposes of clarity. Mr. Dixon has referred to them all under the blanket title "Dealer," and without showing that the testimony of a particular witness referred only to L-O operators, and actually did refer to that, leaving the inference, I am afraid, that there was testimony there concerning the independent dealers. I think the most illustrative reference of that sort was Mr. Dixon's argument concerning the changes in the defendant's form of contracts that were made, and were testified to by Mr. King and others, which followed your Honor's decision in the Standard Oil case in 1948.

Your Honor will recall Mr. King's testimony, first as to the changes in the 3-C type of contract. You will recall that the 3-C type of contract was an entire requirements contract, and that there were some—we will get to the numbers of them later—somewhere between two and three hundred 3-C contracts. Those were all amended and changed following your Honor's decision, and were put on a specified quantity contract basis, the same as the 337 contracts had been. Instructions were given at that time as to how the [fol. 3210] quantities were to be computed, to make sure the door was open to the dealer concerned therein, if he wanted to. He was not to be permitted to buy more than 85 per cent of his past requirements.

There were also instructions concerning the manner of computing quantities in the 337 contracts, and the 337 type of contract was changed at the same time to provide for a 30-day cancellation by either side, rather than just five days by Richfield, as it had been in the case prior to that time. And the painting agreement was changed to take out any reference to competitive signs, that might be misinterpreted.

Mr. Dixon mentioned those changes, which followed your Honor's decision, and then in commenting on the changes which resulted from those, he gave two illustrations. One was the Delucchi station, which he mentioned, where Mr. Delucchi was told by a competitive salesman

about your Honor's decision in the Standard Oil Company case, and it was pointed out to Mr. Delucchi that he could buy from whomever he saw fit. Mr. Dixon also mentioned as a second illustration Mr. Baird, a competitive supplier, and cited both of those as illustrative of the fact that, despite the changes in the contracts, there has been no change in the defendant's operations.

Now, I think that is where the confusion arises. Mr. [fol. 3211] Delucchi was an L-O operator, as recorded in the transcript commencing at page 1357.

Mr. Baird did so testify, that following your Honor's decision he discussed the matter of your Honor's decision with various people, he testified, about four stations. His testimony is in the transcript commencing on page 1601. All four of the instances that he mentioned were L-O operators. I think it is an unfair inference to leave by way of argument that the changes that were made in contracts respecting the 3-C and the 337 stations have resulted in no change. The fact is that the only illustrations that have been given are instances referring to the L-O operators.

All of the proof in this case shows there are certain basic differences between the two types of stations. The basic differences are pointed out in the stipulation of facts, to which I commend your Honor's attention, which is defendant's Exhibit A. The reference to the nature of the ownership of Richfield, its basic ownership, either fee ownership or lease in the L-O stations, and it discusses the nature of the ownership of the 3-C and the 337 dealers, the two separate types of independent dealers. They either own their own station, or lease them from property owners other than Richfield.

There are also basic differences in Richfield's organizational set-up. There is a sharp line of demarcation through- [fol. 3212] out the entire marketing organization. There is the merchandising part of the marketing department, which deals only with the L-O stations, and there is the salesmen's portion, which deals only with the independent stations. That is Mr. King's testimony, and it appears in the record at pages 1658 to 1666.

Mr. King testified that the merchandisers and the merchandising organization deal only with the L-O's. There

is in the record as Exhibits N, N-1 and N-2 the written instructions to merchandisers, and the different types of merchandisers, and the job classifications, showing that they have nothing to do with independent stations.

Similarly, there is in the record the job classifications and work habits of the salesmen. Those are exhibits N-3 and N-4. They deal only with the independents and not with the L-O's.

Mr. Dusto was the assistant division manager, in charge of the merchandising part of the Central Division. He gave a complete statement concerning the detailed relationship with the L-O operators. He had nothing to do with the independent dealers, and he testified that that was the uniform practice throughout the company's operations. All of the government's witnesses testified similarly as to the breakdown and absolute sharp line of demarcation within the defendant's marketing organization. I refer to the [fol. 3213] government's witnesses Pittman, Shewbridge, Minor, Weston, and Miller, all merchandisers, who testified they had never had anything to do with the independent dealers. All of the government's L-O operator witnesses also testified they never saw anyone but merchandisers.

Mr. Bradford, to whom Mr. Dixon referred during his opening argument, was not a supervisor for the company. He was a branch manager for the city of Portland. He testified that there were meetings attended by both merchandisers and salesmen, and it is apparent from an examination of his testimony, which appears in the record from around page 861, that his instructions concerning competitive products and the non-handling of competitive products and the non-showing of competitive signs had nothing to do with the independent stations, but solely had to do with the L-O stations.

Mr. Scollard's testimony, which appears in the record at around page 972, is to the same effect.

Mr. Bradford testified that as to the independent stations, and he admitted that you could not tell them what to do, and he also said it was the salesmen who dealt with the independent dealers.

Consequently, I point out again, by way of introduction, that no testimony concerning Richfield's relationship with

or control over the L-O operators should be considered by this court as having any bearing in connection with the [fol. 3214] allegations of the complaint concerning the independent dealers.

I mention again that that testimony cannot be used interchangeably. Mr. Dixon referred to the testimony of two TBA distributors, Pitts and Gates, and to the testimony of Mr. Scollard. An examination of their testimony will show that when they were talking about any limitations on competitive products or competitive signs they were not talking about independent stations, they were talking about L-O stations.

Now, the second point, by way of introduction, and I think that I would like to eliminate this at the very outset, is the distinction between the case at bar and your Honor's decision and the decision of the Supreme Court in the Standard Oil case. I feel that the two are most vitally different.

Let us consider first the application as to the independent stations, and, second, as to the L-O stations. In the independent stations in the Standard Oil Company case, you had admittedly exclusive dealing contracts. There were written contracts, and there were some that were oral contracts included, but everyone was admittedly an exclusive dealing contract. All the written contracts were entire requirements contracts on their face, and there was no question of denial of the exclusive dealing involved in the Standard Oil case. The sole issue in that case was with [fol. 3215] respect to those Chevron dealers who were independent dealers, and would be in the sense I am using them here, where they either owned their own station or leased them from others. The sole issue there was the effect of those contracts and the application of the Sherman and the Clayton law to them.

Standard's position, your Honor will recall—again I mention that it is presumptuous for me to comment on your Honor's decision in that case—but Standard's position there was that there was no effect on interstate commerce, that the contracts were not unreasonable in any way in talking about the practices of their competitors, and, as I say, there was an interstate commerce point. There was no

question of denial of exclusive dealing, where that is the only issue insofar as the 3-C and the 337 stations are concerned.

We admit freely that the 3-C contracts which were in existence from 1945 to August of 1948 were exclusive dealing contracts. Mr. King discussed that and explained it. He explained how the 3-C contract came into effect, but he also explained why and under what circumstances those contracts were changed in August of 1948, and in defendant's Exhibit A, which is the stipulation of facts between the parties to this case, it is stipulated that in August of 1948, and following your Honor's decision in that case every one of the forms was destroyed, negotiations were undertaken to amend all of those contracts, and to eliminate all [fol. 3216] exclusive dealing provisions, and to put them on a specified quantity basis, which your Honor recalls mentioning with approval in your decision in the Standard Oil case. And all of the contracts, with the exception of four, have been so modified and amended. So much for the independent station.

As to the L-O stations, as your Honor pointed out during Mr. Dixon's argument, it is the defendant's position that these are comparable to Standard Oil Company operated stations, as to which in the Standard Oil case you recognize they did not and could not violate the antitrust laws.

The L-O stations in this case can bear only a most superficial resemblance to the Chevron stations which had been leased by Standard to the dealers under the form of sublease.

There was no contention in the Standard Oil Company case, as there is here, that the occupants of those leased out stations were not independent. Standard admitted they were independent, and the testimony so shows, and it came out without Standard's objection, and Standard so admitted in its pleadings, and it made no objection in the appeal to the Supreme Court. Standard did not contend that they did not constitute a competitive market.

Furthermore, I believe I may have misunderstood your Honor, but I interpreted your Honor's remarks during Mr. Dixon's argument to be to the effect that Standard had also [fol. 3217] contended that its relationship with its leased

out stations was such as to be justified under the antitrust laws. I don't know to what particular contention your Honor was referring, or if I properly understood your remarks, but I have searched——

The Court: Well, Standard was relying on the Pick case, to the effect that contracts of exclusive agency are permissible, and I distinguished the Pick case by holding that that case is not involved in a restriction on commerce. I held that even though the contract may be legal, if its effect is to restrict interstate commerce, it would be illegal. And Mr. Dixon was contending in that case that a contract for exclusive agency is per se illegal. I did not follow him at all.

Mr. Paradise: Yes. Now, as pointed out in Defendant's memorandum on page 39, Standard had admitted in its pleadings, as appears in the transcript on appeal to the Supreme Court on page 91,—it admitted that the 1800 of its service stations were leased to independent operators by leases, and then it went on. The terms of the leases and the distinction of those leases is described in the Supreme Court's decision as being for six months, and I am reading from page 296, and the reference to the term is contained on page 38 of the defendant's memorandum. I gathered from reading the opinion that no sublease was for a term of less than six months.

[fol. 3218] Mr. Dixon mentioned in his opening argument that in the Standard case there were 87 of the subleases under Standard's form of sublease that were tentants at will.

[fol. 3219] I gather that that is taken from the exhibit which appears on page 1315 of the transcript on appeal to the Supreme Court in the Standard case, which discusses stations which are occupied, Standard stations which are subleased. And I am reading from the exhibit on that page part (b) of stations where Standard owns the real property, states this:

> "Occupied by independent dealer"——

Independent dealer, mind you—

> "under a contract of some kind obligating the dealer to buy his requirements of petroleum products from Standard, but without a sublease from Standard."

Now, whether it was the sublease or some other form of a written contract, I submit it was not a tenancy at will if a man had a six months' deal. That distinguishes this case, I think, from the Standard case on the proposition of duration. But more importantly, there was no question of whether or not this was a market in the Standard case, nor was there any question whether these men were independent businessmen.

I call your Honor's attention to portions of the testimony itself. Mr. Thompson, an official of the Standard Oil Company, your Honor will recall, testified on page 287 in an-answer to Mr. Dixon's question. Mr. Dixon's question:

> "In other words, he was, as far as the company was [fol. 3220] concerned, an independent businessman, shall we say?"

Mr. Thompson said: "That is correct." The witness also added:

> "And I am speaking of our policy of handling the account from a practical standpoint."

That is on page 287.

Mr. McClanahan, vice-president of the Standard, testified on page 267 in response to Mr. Dixon's question. Mr. Dixon asked him:

> "Is not the operator of this single pump or split pump station supposed to be an independent businessman?"

Mr. McClanahan said: "That is right."

> "Operating on his own?
> "A. That is right."

Mr. Mortensen was an employee of the Standard Oil Company and testified similarly on page 953. He was asked:

> "As a matter of fact, he is supposed to be an independent businessman under this contract, is he not?"

And he answered: "That is right."
And "Q. And to operate his own business?
"A. Yes."

Mr. Hodge, a branch manager at Nevada, was asked on page 962 by Mr. Dixon:

[fol. 3221] "By the way, Mr. Musser wasn't receiving any salary, was he, from the Standard Oil Company or Standard Stations, Inc.?
"A. No, sir.
"Q. You don't want the court to believe, do you, that he was under any obligation to take orders from you with reference to anything he did at the station?"

And Mr. Hodge answered:

"A. We never gave him orders."

I think it must be apparent the most vital differences between the relationship between Richfield and its L-O operators, and what was involved between Standard Stations which it leased to dealers, which it acknowledged were independent dealers.

So the issue is sharply drawn that in the L-O stations this is not a market, these men are not independent businessmen, and this is not a legitimate market to competitors, and there can be no violation of the antitrust laws either in fact or in contemplation of law. Passing then from the introduction to the discussion of the three types of cases, separately, and under which I would like to point out, first, the proof, the defendant's proof, and then to point out what proof, if any, there is contrary to it by the Government pertaining in each case to the particular type of station, and not having [fol. 3222] evidence pertaining to one type flop over and apply to a different type of station.

First, as to the 3-C's and the 337's, because I think that is purely a factual issue and can be disposed of rather readily. The complaint in this case particularizes, at least insofar as to the 337 stations, although the references to the L-O stations are confused with the 3-C stations. They have been thrown together because there is a sublease involved with both, although Mr. King explained the most vital difference between the L-O station and the 3-C station.

Mr. King testified, as your Honor will recall, with the 3-C station the station is owned or leased from the property owner, not from Richfield, by an independent service station dealer, who leases the property to Richfield and under the 3-C deal gets a lease back and also a sales contract. Mr. King testified that when that contract and lease is terminated, the 3-C dealer stays in occupancy of the station. He differentiated that sharply from the L-O station where Richfield either owns the property or leases it from a person having no relationship whatsoever to the L-O operator, and when Richfield's relationship with the L-O operator terminates the L-O operator leaves the station. It is Richfield's station. He does not continue handling gasoline in it at that location, and Richfield continues doing business there as it had in the past.

With respect to the complaint the allegations with respect [fol. 3223] to the independent stations, but here limited to the 337's, are contained in paragraphs 19 and 20.

In paragraph 19 it is the allegation that defendant has entered into a written painting agreement and a written sales agreement with approximately 1400 service station operators. Passing the description of the duration of the sales agreement, which has not been true since 1948, but was true at the time the complaint was filed, the complaint goes on to allege that in addition to those two written agreements, the written sales contract and the written painting agreement, that Richfield has entered into supplemental oral contracts and agreements and understandings with each of the 1400 service station operators whereby those operators agree to restrict the brands of petroleum products and automotive accessories which are handled by them to brands approved by Richfield, and also agree to acquire from sources designated by Richfield all automotive accessories.

In each case it is a matter of agreement and is so pleaded.

We submit that there is no showing and there is no testimony whatsoever of any oral agreement of any nature whatsoever on any of the 337 stations. I will analyze the testimony later, but I wanted to show what is charged in this case.

In paragraph 20 there is an allegation that threats, both express and implied, by Richfield that it will cancel the

[fol. 3224] sales contract, that is, the written sales contract, unless the oral agreement described in paragraph 19 is entered into, adhered to and complied with by those 337 dealers.

We submit that there is not a word of anything of that sort in the record before this court.

There is an allegation at the end of paragraph 20 that in instances too numerous to be mentioned the defendant Richfield has actually cancelled the written sales agreement of this 337 dealer—I am paraphrasing to reduce—to conform to the oral agreements, contracts and understandings complained of.

There is no showing of any cancellation of any 337 contract excepting in two respects. One, Mr. King's testimony that Richfield withdrew from some 40 to 50 split pump stations in 1938, and that the problem has not arisen since 1941, 10 years ago.

Second, his testimony that Richfield has cancelled 337 sales contracts but only in the circumstance where the 337 dealer had completely discontinued the purchase of all petroleum products from Richfield, and that his purpose was two-fold, in some cases so that he would be permitted to collect on a paint agreement, and second, to await the contract deadline.

Paragraph 21 of the complaint says that these contracts —and we are talking about the independent dealers—have [fol. 3225] had the effect of preventing and eliminating competition between Richfield and other producers of oil and of accessories.

There has been no showing of any effect whatsoever on competitors or on independent dealers.

Insofar as the allegations concerning 3-C and the 337 stations in the aggregate, I submit that this is not a problem of a conflict of evidence. It is a case of no substantial evidence in the record whatsoever that would support any finding of any exclusive dealing arrangement, agreement, or effect.

Now, the independent stations fall into two categories and I would like to discuss them separately.

First, there are the 3-C stations. Mr. Dixon during his opening argument mentioned the 2-B deals, but Exhibit A, which is the Stipulation of Facts, shows that this 2-B deal

which Mr. Dixon quoted from at some length has been discontinued in 1944, and all of the contracts of that nature have expired and there have been no contracts of that nature written since 1944, seven years ago.

First, considering just the 3-C dealer, and not the 337, what is the status of the 3-C dealer? Mr. King testified that he is the customer for whom Richfield is competing in competition with other oil companies. I refer the court to Mr. King's testimony at pages 1753 and 4, and at 1792 he also referred to the extra margin letter which is given to 3-C dealers on occasion to meet the competition, "intense [fol. 3226] competition," as he framed it, of other oil companies. I refer to pages 1890 and 1892.

It is stipulated in the Stipulation of Facts which is Defendant's Exhibit A—and I am reading now from page 3—and refer to the fact that dealer stations are in a category called under the title of "Dealer Stations," starting on page 3. The Dealer 3-C stations are divided in the stipulation between the early form which is known as the 2-B form which Mr. Dixon referred to, and the subsequent form known as the 3-C proposition or a 3-C deal. But as to the status of the dealer under the old or the new form it was still the same.

Now reading from the stipulation on page 4, starting in line 6:

> "The term 'Dealer 3-C Stations' as used herein relates to service stations owned by the service station dealer or leased by the service station dealer from a lessor other than defendant, which stations have thereafter been leased to defendant by written lease. Defendant has subleased such service stations back to the respective service station dealers and has entered into a written sales contract with such service station dealer covering the purchase of petroleum products by the dealer from the defendant."

And then it describes the type and form numbers of contracts.

Richfield's contact with that dealer, that 3-C dealer, to [fol. 3227] secure his business is made through a salesman, not through a merchandiser. These men are the inde-

pendents who are Richfield's customers. Mr. King so testified on page 1663.

Richfield's contact with that man after the contract is signed is likewise with the salesman. See page 1795.

The nature of the 3-C deal was testified to by Mr. King on page 1790. It consists of this lease, sublease, and sales contract.

Mr. Dixon referred in his argument to a paragraph of Exhibit 4, Government's Exhibit 4, as an illustration of Richfield's complete control over the stations. That paragraph is paragraph No. 3, which provides that the lessee shall use—Richfield's is the lessee from the owner or present senior tenant in this case, and "lessee" in this case refers to Richfield—

> "Richfield shall use the demised premises and improvements with due and reasonable care and on termination hereof shall deliver up said premises and improvements unto Lessor in good order and condition, damage and depreciation due to reasonable use, ordinary wear and tear, fire, storm," etc., "beyond control of Lessee excepted."

The reference or the portion to which Mr. Dixon must have made reference is in the second and last sentence, which says:

> [fol. 3228] "Lessor," which is the property owner, "agrees to commence, within 10 days after receipt of notice in respect thereto from Lessee, all repairs and/or replacements necessary in order to keep and maintain the leased property in a suitable condition for the operation by Lessee of a gasoline service station."

I see nothing in there that gives Richfield any control whatsoever concerning the type of product that is involved. That is a matter that relates to the repairs to make it suitable for operation as a service station.

Mr. King testified on page 1790 that the lease, sublease, and sales contract are all with the same person in the normal pattern of events.

He said that the Moore and Colmery stations were extraordinary, sporadic, etc. He testified that they were extra-

ordinary exceptions to the 3-C pattern. Those were two of the witnesses called by the Government where the property owner leased the property in each of the Moore and Colmery cases. Richfield had this lease from the property owner and then subleased it to Mr. Moore in one instance and Mr. Colmery in the other. That appears on pages 1795 and 1797.

Your Honor mentioned earlier in the trial the matter of whether things were sporadic instances or showed a pattern. [fol. 3229] The sales contracts which accompany the 3-C deal have been of two types. I should mention, in the first place, that neither type has ever mentioned tires, batteries or accessories. The sales contracts, of course, are limited to petroleum products, gasoline and oils.

The "entire requirements" was used by Richfield for the period commencing in 1945 and continuing until August of 1948.

Our stipulation of facts, which is Exhibit A, contains on page 4, starting in line 25:

> "The aforesaid prints of form 783 contained a provision requiring defendant herein as seller to sell and deliver and the service station dealer to purchase and receive the dealer's entire requirements of petroleum products for resale from the service station."

It continues:

> "In August 1948 there was printed:"

A form 783 sales contract with a print date of August 1948 which had eliminated therefrom the provision requiring the dealer to purchase his entire requirements. At the time of such print in August of 1948 all copies of the forms of the 3-C sales contract containing the entire requirements provision were destroyed and defendant immediately negotiated with all 3-C dealers to amend the former "entire requirements" form of sales contract and to execute in lieu [fol. 3230] thereof a 3-C operator's sales contract form 783 as of the date hereof. That is the date of the stipulation.

There are in effect only four 3-C sales contracts containing exclusive dealing provisions.

Now, the 3-C deal during the time when it was an "entire requirements" deal, from 1945 to 1948, was changed only

when Richfield had made an investment in the station because of competitive conditions. Mr. King testified to that effect on pages 1792 and 1856.

He testified that where competitive conditions did not require Richfield to make an investment, the 337 type of transaction was used, which is the simple sales contract which, in some instances, is accompanied by a painting agreement where the dealer requests painting by Richfield.

Mr. King described the type of equipment and improvements to the station and the money which constituted Richfield's investment in the station. See pages 1754 and 1856.

He stated that Richfield at the time it made that investment because of competitive conditions and at the time it made the 3-C deal with this independent dealer, did have the purpose of having the man buy his entire requirements of petroleum products from Richfield, and his purpose was, as he stated, he thought it was a reasonable request when Richfield made that investment. See page 1792.

I think that is important, your Honor, because Mr. Dixon [fol. 3231] has made the charge that the 337 sales contract, which has never called for entire requirements of either gasoline or oil—and it does not cover anything else—while it calls for a specified quantity, is, nevertheless, in effect an "entire requirements" contract.

From Mr. King's testimony it must be apparent that when Richfield expected the dealer and asked him and wanted him to buy his entire requirements of petroleum products, it said so very candidly and forthrightly in its written form and printed form. Mr. King so testified on page 1792.

The "entire requirements" form was discontinued in 1948 following your Honor's decision in the Standard case on the recommendation of the legal department, and the recommendation is testified to by Mr. King. So that the "entire requirements" contract has been determined in that case to be illegal. When Mr. Dixon in his opening statement mentioned that a change had been made in the 3-C type of deal, he made the remarkable statement—remarkable to me—that this change showed Richfield's monopolistic intention to control. I confess I did not understand.

I think Mr. King's testimony concerning the reason for making the change appears on pages 1792 and 1793. I think

the reason for that change and the reason why the change is made is significant in this case.

Your Honor is familiar with the cases wherein the prob-
[fol. 3232] lem of a discontinuance of past practices are argued to be moot, and the courts have held that that does not make it moot, an injunction may or may not be warranted. The question as to whether an injunction would or would not be warranted as to a particular past practice, as I understand it from the cases—and we can submit authorities to your Honor—is this: Injunction is warranted if it appears to the court that there is a reasonable likelihood and probability of the practices being resumed.

But on the other hand, if it appears to the court that there is no reasonable likelihood of past practices, which have been discontinued before trial, being resumed, then the injunction is not warranted.

The Court: That is but an application to this type of litigation of the general principle which obtains in all equity cases where injunctive relief is asked.

[fol. 3233] For instance, when we had the O.P.A. regulations, whether they related to rent control, or other things, we always made an inquiry into the past practices, which, first, go to intent, and, secondly, to determine the extent of the relief. For instance, if we were dealing with rent control, we inquired if the property had since changed hands and the defendant did not own any other property, because then there was no use to issue an injunction on the supposition that he might acquire property in the future. If the violation was an only violation, for instance, but nevertheless if the man owned an apartment house, then even a single violation was considered in determining whether injunctive process should be issued. So those principles you refer to are general principles that apply to the particular type of litigation.

Mr. Paradise: I refer to this for the reason that it seems to me that it appears most definitely from Mr. King's testimony, as well as from the stipulation, that the entire requirements contracts were discontinued completely in 1948, have not been used since, the forms destroyed, and, more importantly, that the reason for the change was advice that your Honor had held they were illegal.

I think that situation can be compared and contrasted with

the situation in the case of United States v. Linde Air Products Co., cited in defendant's brief, which is at 83 Fed. Supp. 978. In that case the defendant had also said there were [fol. 3234] practices that it had discontinued sometime prior to the trial, which did not warrant an injunction, but the court found and the testimony was that the defendant in that case had discontinued those types of contracts solely because of business expediency, that it was a matter of profit and that, therefore, the court was justified in saying there was a reasonable probability that this type of contract would be used again in the future.

The Court: Of course, it is Mr. Dixon's contention that, despite the discontinuance of the written requirement, in effect various devices are used to achieve the same results. In other words, he has said in his closing argument that there are provisions in the contract which are kept, like a saving as to damages, in order to result in this overriding oral understanding.

Mr. Paradise: I think that is the danger I attempted to point out in the beginning, your Honor, that Mr. Dixon's reference to that sort of damage was to the L-O stations, and if we would keep these matters distinct and in proper perspective, I think we would reach the proper result.

Mr. Dixon did mention that after the change in the form of the 3-C contract, there was no change in effect, and that there have been devices to keep these as exclusive dealing contracts, but there is no evidence in this record concerning that matter, and I request counsel to show me any evidence, [fol. 3235] if they are able so to do.

I will discuss the evidence when we get to the question of effect, but for this purpose I am just stating the reason why the change had been made.

Now, the new form of contract, which was used commencing in August of 1948, is also called Form 783, and it is Government's Exhibit 4-C. Mr. Dixon in discussing the various 3-C forms of contract in his opening argument mentioned all of them excepting this particular form, which changes the entire requirements contract to a specified quantity type of arrangement.

Now, that form, Exhibit 4-C, which calls for the purchase of a specified quantity, must be compared with the prior

form, which called for the dealer purchasing his entire requirements, and that is Government's Exhibit 4-B.

Mr. King testified as to his instructions at the time this form was printed, instructions as to his organization, to his divisions, as to the manner in which the quantities were to be computed. He testified that for the purpose of determining the quantity which the dealer agreed to buy, and your Honor, on examining that form, will see two columns, one minimum and one maximum, and Mr. King testified that the dealer's obligation is to purchase the quantity designated as the minimum, and he has the right to buy an additional quantity up to the maximum. But Mr. King's in-
[fol. 3236] structions as to how to fix the minimum, which is the dealer's obligation, was that that was to be fixed at a quantity not in excess of 85 per cent of the dealer's past purchases on an average basis during the period of a year prior to that, giving no account to the fact that the dealer might, because of increasing demand, and so on, increase his purchases. The dealer was not to be permitted to commit himself to buy in excess of 85 per cent of his past experience. See Mr. King's testimony at pages 1792 and 1793.

He also testified that subsequently those instructions were modified in 1950 to the effect that the dealer was not to be permitted to buy in excess of 75 per cent of his past experience. That appears at pages 1756 and 1873.

Mr. King likewise gave the reasons for those instructions, that those instructions resulted from advice to him, from the legal department, at the same time as the advice to change from the requirements form of contract. See pages 1756 and 1873.

He testified that the dealer's obligation was limited to buying the minimum quantity specified, and he has an option to buy the excess up to the maximum stated. That is on page 138.

Now, the number of 3-C contracts is set forth in Government's Exhibit 26-A on page 13, and I think it is worthwhile to take time out for a moment to examine that par-
[fol. 3237] ticular schedule. That refers to 3-C stations in all states, and the schedule, if the court has it available, shows the number of 3-C stations,——

The Court: What is your exhibit number?

Mr. Paradise: —as of December 31st of each year, commencing in 1938.

The Court: What is the exhibit number?

Mr. Paradise: Government's Exhibit 26-A.

The Court: All right.

Mr. Paradise: It is the one, you recall, where the statistical material was gleaned from the stipulation of facts.

The Court: That is right.

Mr. Paradise: The number of 3-C stations is stated for each year, as of December 31st of each year, commencing in 1938 and ending in 1951. The third column is entitled "Entire requirements provision," and it shows the number of those 3-C stations, the greatest number which were ever subject to the entire requirements. Those are designated by an asterisk in the third column.

It shows, as your Honor will recall, that the 3-C forms were used commencing only in 1945, but we have classified, for convenience, the former 2-B deal as a 3-C type of station, and that is in accordance with the stipulation in Defendant's Exhibit A, but picking it up with 1945. Prior to 1945 there [fol. 3238] never was a 3-C contract with a requirements provision in the sales contract. There were 2 at the end of 1945, 93 at the end of 1946, 182 at the end of 1947, and at the end of 1948 there were 43. In August of that year Mr. King's instructions had gone out to discontinue writing those, and to modify the existing ones. At the end of 1949 there were 26, at the end of 1950 there were 7, and as of the date of this case, by the stipulation of facts, there are only four in existence.

Now, the quantities the dealers have agreed to buy, the 3-C dealers, is in comparison with their requirements and in comparison with their former experience, and is well illustrated by Defendant's Exhibit Y, a statistical table which covers both the 3-C contracts and the 337.

This compilation shows that out of a total of 1640 contracts, which are all those in existence as of February 28th of this year, when this compilation was made, that the 1640 Total contracts covers both the 3-C sales contracts and the 337 sales contracts, and of that 1640 214 of them fell into a category where the quantity stated in the contract was 90 per cent or more of the dealer's past experience, and that was 13 per cent of the total. 560 of them fell in the category

called Group C, where the quantities specified in the contract, which the dealer agreed to buy, was between 80 and 90 per cent of the quantity which he had previously [fol. 3239] been buying for that station. That constituted 34 per cent of the total. 458, or 28 per cent of the total, fell in Group B, where the quantity which the dealer agreed to buy was between 75 and 79 per cent of his past experience. And a full 25 per cent, 408 contracts, fell in the category of less than 75 per cent. So from that you can see how well Mr. King's instructions were followed out, because this includes all the 337 sales contracts and all 3-C sales contracts in effect as of the time of this compilation. 87 per cent of the contracts fall in the category where the quantity in the contract that the dealer has committed himself to buy is less than 90 per cent of his past experience, and 53 per cent of the contracts fall in categories where his commitment is less than 80 per cent of his past experience. By the way, that group D, the category of 90 per cent or over, includes contracts in existence as of the date of this compilation, and that includes those that are the unconverted 3-C contracts, exclusive dealing contracts, where the dealer refused to permit an amendment or modification of his contract, and I suggest that those fall within that 90 per cent bracket.

There is also testimony that, when we get to the 337 contracts, the 90 per cent bracket is also covered by some of the contracts, 337 contracts, that were in existence before these [fol. 3240] Now, still speaking again of the 3-C dealers, Mr. King testified as to the buying practices of the 3-C dealers, and this I think is most important, because Mr. Dixon has made the charge in the opening statement that notwithstanding the change in the contract that was made in 1948, there has been no change in practice. I think Mr. Dixon stated that that appeared in the record, with that conflict.

Mr. King's testimony is decidedly to the contrary. He testified on page 1897 that over 75 per cent of all of the independent service stations, including the 3-C's, as well as the 337's, handled competitive oils, greases, and TBA. He testified that the same per centage showed competitive signs of these competitive items. He testified that purchases of gasoline in excess of the stated quantities in the

contract were voluntary by the dealers. See page 138. And he gave his reasons why they were voluntary. We will get to that when we discuss this split-pump problem that Mr. Dixon raised.

Now, Mr. King also testified that there is no control and no supervision, and no attempt at control or supervision by Richfield over the 3-C dealers.

On page 1794 Mr. King testified that Richfield has never attempted to terminate the sales contract or 3-C dealer and at the same time attempt to retain a leasehold interest in that station. He said it has not occurred. He said that [fols. 3241-3243] Richfield has never attempted to control the 3-C dealer. See page 212.

Now, the foregoing is Richfield's proof concerning the 3-C contracts. Let's compare that with the government's proof, and see what there is, if anything, to support the government's charge in this case.

The Court: Unless you have some specific thought there, I think this is a good stopping point.

Mr. Paradise: Very good, your Honor.

The Court: You have reached a break, and you have had an hour, so we will continue tomorrow.

The Court: All right. Thank you, your Honor.

The Court: All right, gentlemen, tomorrow morning at 10:00 o'clock.

(Whereupon, at 5:00 o'clock p. m., Tuesday, June 5, 1951, an adjournment was taken until 10:00 o'clock a. m., Wednesday, June 6, 1951.)

[fol. 3244] Wednesday, June 6, 1951, 10:00 A.M.

The Court: All right, gentlemen, proceed.

Mr. Paradise: If the court please, in the interest of time, that is, to have sufficient time to cover adequately the problem of the L-O stations, which the court appreciates is the really novel and important phase of this case, I would like to cover the balance of the argument concerning the independent stations rather rapidly.

The Court: All right.

Mr. Paradise: And therefore I would like to omit reference to transcript references to testimony, unless the court asks for the reference to a particular matter.

When we concluded yesterday we had discussed what was the defendant's purpose and what the practices were in connection with the 3-C contracts, and also what the testimony was concerning them. We had stopped at what the Government's proof was concerning the 3-C contracts, to ascertain whether there was any proof of any nature in support of the Government's charges. The Government failed to call any ex-employee of Richfield to testify to any 3-C transaction, excepting solely Mr. Bradford who was the branch manager at Portland.

Mr. Bradford testified he had instructions that 3-C contracts were to be on a 100 per cent basis. And the court will recall that that is perfectly consistent with the con-
[fol. 3245] tracts. Mr. Bradford was Portland's branch manager until the end of 1945. The "entire requirements" contracts were, of course, changed in 1948.
[fol. 3246] No other former employee of Richfield testified to any 3-C transaction.

The government did put on four 3-C witnesses, and I submit the testimony of each of those witnesses is consistent solely with the testimony of Mr. King, and is to the effect that these are not entire requirements contracts since the change of the contracts pursuant to Mr. King's instructions in August of 1948, following your Honor's decision.

Mr. Moore was the first witness. He had an entire requirements contract, but the court should note that even while his entire requirements contract was in effect he handled competitive TBA, and he was a distributor for the U. S. Rubber Company.

You will remember Mr. Moore was from Medford, and the property was leased from Mr. George Field to Richfield, and from Richfield to Mr. Moore. It was not a true 3-C pattern because Mr. Moore knew the underlying property owner, and he would not consent that it be leased to Richfield unless it went back to Mr. Moore at the same time. Mr. Moore did amend the entire requirements contract to a specific quantity contract, as Mr. King had instructed. He didn't want to sign it. There was discussion that he didn't want to make the amendment, and the reason he didn't want to I think is particularly significant. His complaint was that the quantities stated in the amendment were too low, that at the time the amend-

[fol. 3247] ment was presented to him Mr. Moore's average gallonage was about 18,000 gallons per month, and the amendment presented to him called for 12,200. He signed it ultimately as a favor to the salesman, even though he didn't want to, and when he subsequently held the property directly from Mr. Field and not from Richfield and signed a 337 contract, he finally succeeded in having the quantities raised to the quantities that he wanted. I submit that that cannot show the restraint Mr. Dixon talks about.

Mr. Colmery was the second 3-C witness. That was also a most unusual circumstance. That wasn't the true 3-C pattern. Mr. Colmery had two leases at the end of the war from property owners, which required him to build service stations. They were long-term leases. He gave up those leases with the property owners after negotiating with Richfield, and getting Richfield's agreement to build two service stations, one costing $25,000 aproximately, and the other costing $15,000 approximately. Richfield was willing to do that if he would agree to buy his entire requirements through the term of the underlying lease from the property owners. Mr. Colmery would not give up the leases unless Richfield agreed to build these two service stations at its own expense, and to give him a sublease for the full period.

Now, that is the witness that Mr. Dixon referred to as having a 20-year deal. That didn't arise out of Richfield's [fol. 3248] desire. That was the requirement of Mr. Colmery.

Now, it was explained to Mr. Colmery at the time that contract was entered into at the end of the war that Richfield would agree to make this investment, provided he bought his entire requirements. That was the 3-C pattern at that time when an investment was called for, to get entire requirements.

After your Honor's decision, Mr. Colmery was approached pursuant to Mr. King's instructions, and requested to sign a specified quantities contract that would eliminate the exclusive dealing feature. He refused to sign it. He wanted a termination clause. He wanted the right to terminate his sublease at any time on 30 days' notice. In March of this year Richfield agreed to give him the 30-day right of termination.

Mr. Colmery testified he was informed at the time he

signed it, and that he knew that the quantity called for in that contract was 75 per cent of his past average sales. The quantities are in the record and may be compared with his contract, and I won't stop to recite them.

Mr. Dixon made mention in his argument of the fact that the quantity was already written in the contract at the time it was presented to him. I don't see the significance of that. The question in this case is whether this amounted to a lockout of the market, as Mr. Dixon argued, and Mr. Colmery knew that the quantity that he agreed to buy, and [fol. 3249] his sole obligation, was a fixed quantity which did not exceed 75 per cent of his past purchases.

Mr. Colmery also testified, and I would like to call your Honor's attention to it particularly—it appears at page 1109 and 1110—he testified that there was also called to his attention the difference between the old form of sublease and the new form of sublease that was adopted in 1948. That I think is important, because it was stressed by Mr. Dixon that the old form contained a provision in paragraph 3, and I am speaking now of Government's Exhibit 17-C, a provision that the dealer, the 3-C dealer, could not alter the premises or put in additional pumps.

[fol. 3250] That limitation was taken out in 1948 and that was called to Mr. Colmery's attention at the time he signed the amendment, and he so knew it and testified to it. Mr. Strable was the third 3-C, and while Mr. Strable was somewhat incoherent, his testimony was that he knew it was a minimum and maximum contract when he signed the amendment from our "entire requirements" contract. His gallonage at that time was from 5,500 to 6,000 and the amendment called for 4,600 gallons per month.

Mr. Ogburn was the last witness pertaining to the 3-C group, and Mr. Ogburn was not a true 3-C, as Mr. King has testified. As to Mr. Ogburn, we don't know anything about the quantity. That is not in the record, so we have nothing to compare there. But Mr. Ogburn was put on, I think, by the Government to show that he hid competitive lubricating oils. He did testify that he had no agreement with Richfield, written or oral. His arrangement was with the property owner, Mr. Mathis, who was the 3-C dealer. He admitted that he was not told that he was not to handle competitive products. So nothing that that witness testi-

fied to can be of much concern, with one possible exception. He testified that a Mr. Froman called on him and made out this service station Form 205, and that is in evidence, Exhibit 22-G. In that connection and also in connection with Government's Exhibit 30, which are similar forms made by Mr. Dart, and to which Mr. Dixon referred [fol. 3251] yesterday, Mr. King's testimony, I think, is most important.

He said that these men are restroom inspectors. He called them health inspectors. Their only duties are in connection with cleanliness of restrooms. Their duties pertain only to the L-O stations, and even in the L-O stations they have nothing to do with competitive products. He also said if they went into any station other than an L-O it was without his knowledge and contrary to instructions.

The Government offered some written exhibits concerning a fifth 3-C station, the McCracken station. That is Exhibit 28, a letter from Mr. King to Mr. DeMartini, stating that Mr. McCracken wanted to discontinue buying gasoline.

I call your Honor's attention to Exhibits T and U, which consist of Mr. DeMartini's opinion to Mr. King as to the fact that no dealer would be forced to buy from Richfield under any circumstances, and Exhibit U, Mr. DeMartini's letter to Mr. Vandenburg who was Mr. McCracken's attorney.

To summarize, the Government had no employee witnesses or former employees of the defendant. They had four 3-C witnesses who testified consistent with the defendant's position and not for the Government. They did put on some competitor witnesses. The Government put on 25 competitor witnesses. No one of them was a competitor in the gasoline line. Only five of them were lube oil competitors and the rest were TBA or TBA and lube.

[fol. 3252] While these 25 witnesses testified concerning their attempts to sell to 92 separate and identified L-O operators, they did not testify as to their efforts to sell to a single particularized 337 dealer station. And they only testified to three 3-C stations during the entire testimony.

Mr. Ellis talked about trying to sell Mr. Colmery at a time when Mr. Ellis was the assiduous Pennzoil salesman, and his testimony relates only to the time when Mr. Colmery was

on an "entire requirements" contract, and then Mr. Colmery would amend the contract at his own insistence on a cancellation privilege. So that testimony, I think, is unimportant.

Mr. Turner of the Christensen Oil Company testified to a station operated by Mrs. Johnson. That is not a pattern 3-C. Mrs. Johnson had no contract with Richfield. Richfield's contracts were with Mr. Smith who owned the property. Mr. Turner's testimony was meaningless because Mrs. Johnson gave no reason to Mr. Turner for not buying oil from him.

Mr. Ogburn: There was a Mr. Cleveland who testified about the Ogburn station, merely said that Mr. Ogburn would not display Mr. Cleveland's products.

In summary of these 3-C's, that is all the testimony submitted to the court that the Government has put in on the 3-C stations. There is a complete failure of proof. This is not a question of conflict of evidence. There is no re-[fol. 3253] straint shown, certainly no pattern of restraint. There is no showing of any threats, any oral agreements, no showing of any cancellation of agreement, no showing of any control.

And mind you, these are all matters of explicit allegation in the Government's complaint. No showing that the competitors could not sell and, as a matter of fact, the testimony is exactly contrary. The testimony is that over 75 per cent of all the 3-C stations do handle competitive lube oil, competitive grease, competitive TBA.

I think that the 3-C contracts, to wind this phase of it up, is the only portion in this case which could possibly have any relationship to your Honor's decision in the Standard Oil Company case, and that would be true if these 3-C contracts contained today, as they did prior to 1948, a provision as to "entire requirements."

The record shows that following your Honor's decision Richfield made a determined effort to comply with the law as your Honor declared it in that case. Other than that phase, the Standard decision has no bearing in this case. Even then, if it did, there would be the problem of substantiability, because if we looked at the numbers of 3-C contracts and the volume involved, they are so small as to be insignificant.

More importantly, however, the discontinuance of the practice in August 1948, on the advice that contracts of that [fol. 3254] sort might be illegal, is a sufficient showing that no injunction of any nature would be warranted as to the 3-C type.

Now, as to the 337 stations, we also have a stipulation with the Government as to the nature of the 337 dealers. It is stipulated on page 5 of Defendant's Exhibit A: The dealer either owns the service station or leases the service station from a lessor other than the defendant.

Mr. King testified that these were the people to whom he referred as "independent dealers." They are Richfield's customers. Richfield competes for their business in competition with the severe competition of its competitors.

On some occasions Richfield is required to extend to them additional inducements in order to get their business. That was the extra margin letter, Exhibit R, which Mr. King testified is not used with the L-O operators.

The nature of the 337 deal consists of the 337 sales contract and, in some instances, the painting agreement.

The 337 sales contracts, if the court will refer to the forms attached to Defendant's Exhibit A, have always been specified quantity contracts. They have never been that entire requirement contract.

The only change in the successive forms occurred between—that is to say, the only material change in the form of the sales contract itself, as distinguished from the painting agreement, occurred in 1948. I am referring to [fol. 3255] Government's Exhibit 5-D, where the termination privilege was changed to permit termination by either the dealer or Richfield on 30 days notice in writing.

Prior to that time, the court will recall that the contract was written for a specified term, but Richfield alone had the right of termination on five days notice. This made the contract readily terminable both by Richfield and by the dealer, and we submit that within the law of the cases as to the reasonableness of the term, the American Can case and others cited in our memorandum, that there could be no problem as to that contract, certainly under the Sherman Act.

As to the nature of the dealer's obligation under the 337 contract, Mr. King testified that it is limited to the buying

of a specified quantity under the column "Minimum". He gave instructions as to this form of contract in the fall of 1948 similar to his instructions concerning the 3-C sales contract on Form 783, I think it is.

He also gave his reasons for his instructions. His instructions were that the salesmen—it is the salesman who contacts the 337 dealers, the same as the 3-C—the salesman was not to permit the dealer to agree to buy a quantity of gasoline computed in excess of 85 per cent of his average monthly purchases in the prior yearly period. [fol. 3256] Where there was a new station, they would make an estimate on it and the instructions were limited to 85 per cent of the maximum. That was reduced to 75 per cent.

In discussing the 3-C stations I commented on Defendant's Exhibit Y, which is a compilation of the quantities. It is a compilation which divides into four different groups the 3-C and 337 contracts and their categories in relationship to the ratio by which the man's obligation to buy gasoline bears to his past experience. I won't repeat that discussion here. It is equally applicable to the 337 contracts.

It is important to note that that compilation shows how meticulously Mr. King's instructions were observed, the instructions given in the fall of 1948.

Prior to 1948, Mr. King mentioned that the pattern was that the salesman negotiated with the dealer on a quantity basis mutually satisfactory to both. There were no instructions limiting the quantity to an amount less than his past experience. It was whatever the salesman and dealer agreed upon.

Mr. King did testify that Richfield has never contracted, however, on the basis of "entire requirements" of the 337 dealer. He said that when Richfield wanted the dealer to buy its entire requirements, as in the 3-C contract, that Richfield's form so specified on its face.

Mr. King also testified as to instructions against any [fol. 3257] oral contracts and referred to the defendant's chart of authorized signatures. Only the written contracts on forms which had been prepared and approved by the legal department were permitted, and those were permitted to be signed within the divisions only if they were signed without any deviation or change whatsoever.

As to the buying habits of these 337 dealers, both before and after this change of form in 1948 put it on a 30-day mutually terminable basis, Mr. King testified here, again, that 75 per cent of all of the 337 stations handled competitive oils, greases, and TBA, and also that the same percentage as a minimum shown and displayed competitive signs.

I think this is the part which must be the complete and final answer to Mr. Dixon's suggestion to the court that there has been a lock-out of a market, and that the pattern insofar as the independent stations is that competitors are locked out.

There is no proof of that in this record, your Honor, and the proof is entirely to the contrary. Mr. King testified that it is true, that, while these dealers want their 337 contracts to remain in effect, they do buy all of their gasoline. He testified that no 337 dealer since 1940 or '41, I think he said, has wanted to go so-called split pump, has wanted to put in a competitive gasoline and, at the same time, to handle Richfield's gasoline. He said when they wanted [fol. 3258] to leave us, they left us lock, stock and barrel. We were out completely.

He testified that many dealers had abrogated their contracts and completely discontinued buying gasoline from Richfield entirely.

[fol. 3259] A compilation which I think is of particular importance in this regard, your Honor, is Defendant's Exhibit X. That is a compilation which shows the number of these 337 accounts which were lost during the period from 1946 to 1950, according to the defendant's own records, and it is a breakdown of the accounts lost between those that were lost by failure to renew at the expiration, and those that were lost during the term of the contract, where the dealer discontinued.

Your Honor will notice the ratio of those lost prior to the expiration, which were 107, compared to 407, where the dealer discontinued buying before the end of his contract. And in the case of the dealer's discontinuance of his purchasing before the end of the contract—and this I think is the most critical thing—at the rate of 3 to 1 the dealers had painting agreements. In other words, three times as many dealers who discontinued buying prior to the expira-

tion of their contract had painting agreements with their sales contract as opposed to the number who discontinued without the painting agreements. The exact numbers were 303 of these accounts lost prior to expiration with painting agreements, and 104 lost without.

There can be only one valid inference from that, and that is that the execution of the painting agreement has no compelling effect upon the 337 dealer to continue purchasing, as has been suggested constantly by the government throughout this case.

[fol. 3260] Now, the painting agreement has been discussed at some considerable length. Mr. King testified as to the reason for the painting agreement. He testified first that Richfield paints the stations of its dealers because it is a competitive practice in the industry. As the oil companies, competitor oil companies, paint these stations, the dealers expect their stations to be painted without charge. That is the standard practice. They will not do business with any oil company furnishing gasoline unless the company agrees to paint the station without cost, and Richfield, if it is to continue to stay in this market and wage competition and compete for their business must paint the station.

Now, Mr. King also testified as to the reason for making a painting agreement. He testified that the reason is that the dealer gets a free paint job, and that the dealer has a right to terminate his contract, and he terminates his contract whether he has a right to or not, and Richfield's reason for having a painting agreement is to have the dealer have an obligation to repay Richfield that cost in the event that the dealer does not buy the specified quantity which he has agreed to buy.

There is no ground, no room for any inference from any testimony in this case that the dealer would have any obligation to pay the painting cost if he failed to buy his entire [fol. 3261] requirements. The evidence is precisely to the contrary.

Government's Exhibit 26-A is important in this case. On page 28 there is a compilation—and this is the government's exhibit, based on a compilation furnished by the defendant, and it was agreed that all the facts are stipulated to be true by the stipulation which is Defendant's Exhibit

L, which is the stipulation covering this—page 28 of Government's Exihibt 26-A shows the number of sale contracts, the total number of 337 sales contracts, and then it breaks that total number down into three separate components.

The first column is the number of 337 sales contracts made without any painting contract whatsoever. The second is the 337 sales contracts made with an accompanying painting agreement, and the third is the 337 sales contracts where there was no painting agreement made at the time the sales contract was made, but the painting agreement was subsequently made, and that compilation goes from 1950 all the way back to 1938.

It must be apparent from that that there is no requirement, as Mr. King testified, by Richfield that it must paint a dealer's station as a condition to Richfield selling it gasoline and, certainly, no requirement that a dealer must enter into a painting agreement before Richfield will sell a dealer gasoline.

If the government charges the painting agreement is withheld, and that we won't sell gasoline unless he will sign [fol. 3262] the painting agreement, there is no basis for any inference of that sort. On the contrary, it is the dealer who demands the painting, and the painting agreement is given and required by Richfield solely to collect its painting cost if the dealer runs out on the contract and refuses to purchase the specified quantity, which is his obligation.

Now, as to the collection under the painting agreement, Mr. King testified, and there is no conflict as to this evidence, that Richfield has never collected on a painting agreement except in the sole circumstance where the dealer has completely discontinued Richfield products. It has never collected on the painting agreement where the dealer continued buying gasoline and handled competitive lube oils or TBA. He said it has never collected or attempted to collect under the painting agreement where the dealer handled some Richfield gasoline and wanted to handle in one of his pumps another gasoline. He said that situation has not arisen, that it has not arisen in the past 10 years, that dealers prefer to deal with one supplier, and they do it voluntarily, of their own volition.

The government has charged that, in addition to the sales contract and the painting agreement, where it is used, that

there is also an oral agreement. Mr. King testified that the sales contract and the painting agreement, where it is used, constitute the entire agreement, and I submit that [fol. 3263] there is nothing in the entire record which suggests any difference whatsoever from Mr. King's testimony.

As to the termination of 337 contracts, Mr. King did testify that there has been termination. Now, I am not talking——

The Court: There is one point I want to bring up for discussion at this time. I don't think Mr. Dixon mentioned it in his argument, but it is whether the painting agreement, tied to the sales contract,—wait a minute. I want to look at my notes of last night. I put it down here when you were arguing.—whether the painting agreement and the tie-in to the sales contract, regardless of any consequence, and, remember, we are dealing here with a complaint under both the Sherman and the Clayton Acts. Under the Sherman Act the practices must result in a restraint. Under the Clayton Act, as I myself have said repeatedly following the decision of the Supreme Court, it is not necessary that the contract have that result. The Clayton Act takes the contracts in their incipiency, and if they have a tendency, a reasonable tendency, to result in a restraint on commerce, then they are objectionable, regardless of whether there is evidence that they had that effect. That is a matter which we should consider, especially in conjunction with those, and, that is, can it not be said that with the way the contract was worded and the way the delivery of these petroleum products was tied to the painting con- [fol. 3264] tract, which exhibited the colors of Richfield and forbade the use of signs of any other products, and granting all you say, that they never foreclosed anybody, never forfeited a contract for buying some petroleum products other than gasoline, or TBA products, whether regardless of the actual result, the natural tendency of the tie-in would not be that. It is inconceivable that a man had tied himself to a contract which obligated him to take petroleum products in certain quantities, and then having had an expenditure incurred by the company, whereby he carried the colors of the company, which is notice to the world that he was selling these products, and whether that would not in reality be such a direct pressure that the man was not

likely to jeopardize the contract by any free dealing with any other suppliers as to any of the products.

Mr. Paradise: I am grateful to your Honor for bringing that up because I think it permits us to orient this particular problem. I don't think this problem can arise under the Clayton Act at all.

Laying to one side for the moment the fact that there were not painting agreements with all sales agreements, but only with a portion of them, as I pointed out in Government's Exhibit 26-A, this problem can arise under the Clayton Act only if the sales contract had been used with the old form of 3-C requirements contract. This problem cannot arise under the Clayton Act, but only under the Sher-
[fol. 3265] man Act.

Your Honor mentioned that the Clayton Act is designed to meet these things at their incipiency, and I am sure your Honor refers to the qualifying clause, to where the effect may be so-and-so and substantially lessen competition, and so on.

The Court: That is right.

Mr. Paradise: However, if this 337 sales contract were accompanied with a painting agreement, it does not qualify under the first portion of Section 3 of the Clayton Act. This is not a contract where the man buys only Richfield products and agrees, directly or indirectly, not to buy somebody else's product. This is a contract to buy a specific quantity. In answer to your Honor's question, while Mr. King was on the stand, I think he delineated the provisions of the painting agreement and the sales contract. He pointed out that Richfield has no right to collect under this painting agreement if the dealer buys the quantity he agrees to buy, regardless of where he buys the balance, and Richfield has never attempted so to do, and there is no such testimony.

The Court: There is a possibility that that quantity which is provided for may so adequately cover it, regardless of the percentage. I think the evidence was it was based on 70 or 80 per cent——

[fol. 3266] Mr. Paradise: The instructions were that 85 per cent be a top limit, and then 75 per cent.

The Court: But it may be fixed at an average so high

there would be no possibility for any purchase, and that would become merely a gesture.

Now, remember my custom. I am asking questions, and I may talk myself out of it. I had a very unusual experience. It has happened to me many times before, and I have told persons that I have actually started to write an opinion one way, and then turned it the other way. When I told that recently to some lawyers, they asked me about the specific case, a rather important case, where the Court of Appeals adopted my opinion. It is a leading case on the subject of trade-marks, Brooks Brothers v. Brooks Clothing Company, and they said the first portion of the opinion read so that I could turn it either way. I said I probably did that because I didn't know which way I was going to turn myself, until I had worked it out.

So I must tell counsel not to take any vested interest in what I say. I started to say that in the last two weeks I had an unusual experience. I have had some very important matters arise on Mondays. That is why on Tuesday my time is so broken up, because I try to keep up with them. We have had a terrible day this last Monday. We were here from 10:00 o'clock in the morning and were still here until 5:30, and worked through the noon hour. [fol. 3267] But I have had some very interesting questions arise. In addition to a question of the constitutionality of the Patman Act on which I had to write an opinion, I have had two cases where I raised certain particular questions, and then had to write opinions talking myself out of the question that I myself had raised.

In other words, to use an expression that is used today, so far as my mind is concerned, it is rather fluid. I hope it will always remain so as long as I am a judge and until I retire for old age. So I do not want you to feel that I have any definite opinion at the present time as to the question about which I asked. But it seems to me that that question should properly be raised because a restraint may exist by indirection, and the court has found restraint way back. A lot of people assume that the recent cases are different from the old ones. What happened was that this law was allowed to remain, to use the expression of a famous president, in an innocuous

desuetude for many, many years by many administrations, including the administration which had attacked the law. Then when it was revived, it developed that many, many years had passed, during which the law could have been developed, and matters decided by the higher court, which were not developed, but going back to the pre-New Deal cases, you will find the Hardwood case, in which Chief Justice Taft wrote the opinion, and the like. They held that [fol. 3268] restraint may lie behind the most innocuous doings, and that, for instance, what they call just the manner of exchange of information may develop by what follows to have been really a command that certain things be done, and in the rigged-up bidding cases the same situation developed. So I say we have to take those situations into consideration, and test that by that criterion too, in order to determine whether behind what seems to be an innocuous looking contract for the purchase of a minimum supply and a contract to have somebody paint your station at his cost, so long as you fly his colors, in reality we did have a shut-out of any possible competition because you have taken care of all of his needs regardless of whether you say so or not, and that you have acquired through the painting agreement a method of penalizing him, if he departed from the rules and advertised other products and put signs on the painted portion of the station.

Mr. Paradise: Now, these are the points that I wanted to mention in that respect, your Honor. One is the recognition that your Honor gave in the Standard Oil decision, that a specific quantity contract cannot lock out competition. The government is speaking of a lockout of this market.

Now, let us assume that there are two problems. One, what could occur under the contract, and, two, what has occurred.

What is the evidence in this case as to whether there has been even the lockout that the government charges in this case? There is no evidence of any lockout. Let us [fol. 3269] take the past experience as to lubricating oils, grease, and TBA. There is testimony that notwithstanding the contract, and notwithstanding the paint agreement, 75 per cent of them at least carry competitive stuff, and 75 per cent of them advertise it.

As to the gasoline, and this, I think, is most significant, the government put on 25 competitor witnesses, and not one of them was a seller of gasoline.

The last case on the Sherman Act said whether reasonable or unreasonable under the Sherman Act depends on whether there has been a deprivation of competitors of reasonable opportunities to sell.

If there had been a lockout as to gasoline, I submit that the government might have put in at least one competitor witness as to gasoline, and that is the only thing that Mr. King testified that the man continues to buy all of, so long as he buys. But he doesn't buy it throughout the term of his contract.

We have testimony as to a number of instances where they terminated and stopped buying, regardless of the duration of the sales contract, and with or without a painting agreement.

I think that same matter was recognized, your Honor, in Mr. Justice Frankfurter's opinion in the Standard case, [fol. 3270] and, similarly, in the Sinclair Refining Company case, this question of practical effect.

The dealer can handle other gasoline if he wants to, and can put in as many additional pumps as he wants to.

Now, Mr. King testified there has never been a termination for failure to buy the agreed quantity, failure to buy grease or competitive products, whether there has been a posting of signs, and so on.

Before we leave the subject-matter of the painting agreements, I think your Honor's attention should be called to the provisions of the painting agreement, which permit Richfield to collect under the painting agreement. The form currently in use, and which has been in use since 1948, is government's Exhibit 5-F, and the circumstances when the dealer must pay are contained in paragraph 3. He pays in the event of his failure to buy the agreed quantity, or in the event that he terminates before the end of the specified term of the contract. He does not have to pay if Richfield terminates for any reason other than his default.

On the matter of whether signs could be placed on the station, and the significance of the provision concerning

signs, I suggest your Honor compare paragraph 1 of Government's Exhibit 5-C, the old form of painting agreement in use before 1948, with paragraph 1 of Government's Exhibit 5-F, which shows, as I think your Honor asked Mr. King, that the reason for the provision against signs [fol. 3271] is so that—first, that the signs only pertain to those on the painted surfaces, not to these curb signs or other competitive signs that are scattered all over these independent stations, and, second, that the reason for the provision against removal of signs was to prevent interference with Richfield's obligation to paint the station, and that has been true ever since 1948.

I would like to spend just a couple of moments on this matter of the split-pump problem. The government offered a split-pump letter by Mr. Dinkins, written in 1938. That letter is 13 years old. We objected to its admission on the ground that it had no present relevance, and that it had not been tied in. Mr. King testified that pursuant to that letter Richfield withdrew from some 40 to 50 accounts back in 1938. He said that there was no public announcement made to the trade at that time, no publicity was given to it. That I think is important, your Honor, in view of the decision in the Carter Carburetor case, cited on pages 20 and 22 of our opening memorandum. The vice in the Carter case was an announcement to the trade by the Carter Carburetor Company, generally publicized, that they wouldn't sell their carburetors to any service station who handled competitive products. Richfield did not do that. There is no showing of any sort whatever.

Mr. King testified that these instructions of 1938 became [fol. 3272] meaningless. He admitted that there was no short memorandum rescinding them. He admitted there was no affirmative memorandum rescinding them, but your Honor recognized it, because you said in the transcript on page 203 that an abandonment of these instructions could occur either negatively or positively. And Mr. King testified these instructions became meaningless, and he testified why they became meaningless, that the buying habits of the public were reflected in the buying habits of the dealer, that the motorist preferred buying at a station which handled one supplier's brand of gasoline,

and that, therefore, the dealer prefers to handle one supplier's brand of gasoline with or without compulsion, and in our case without compulsion, and speaking of the independent dealers, the dealer is not permitted to agree to bind himself to anything approaching his requirements.

Mr. King testified that Richfield does not solicit the business of particular dealers operating certain split-pump stations.

That is a matter of non-solicitation, if your Honor please. He does not go out and try to obtain that particular business, and he gave the reason why, that they were disreputable stations, the quantity was low, and they did not observe Richfield's fair trade price schedules. He testified that Richfield does not solicit their business on the basis of any agreement or understanding that the dealer buy all of his requirements from Richfield.

[fol. 3273] The Government's evidence as to the 337's is almost non-existent. They had some evidence concerning 3-C stations which was consistent, as I pointed out, with Richfield's position, but as to the 337 stations there is no testimony whatsoever except in the respects that I shall mention.

There was no testimony in support of the charge that there is an oral agreement in every case as to exclusive dealing, or that there was a threat of cancellation of sales contracts.

Those are contained in paragraphs 19 and 20 of the complaint.

There is no evidence in support of the allegation of inspecting and policing and supervision of the activities under paragraph 20.

There is no evidence in support of the allegation of 20 that in instances too numerous to be mentioned Richfield has cancelled sales contracts of dealers who refused to conform to these alleged oral agreements.

Paragraph 21 alleges that Richfield prevented the competition of these competitive suppliers. But there is no competitive supplier who testified about it, that he was unable to sell.

The Court: Pardon me. Go ahead.

Mr. Paradise: The only 337 dealer who was called was

[fol. 3274] Mr. McRae. And I am not sure that Mr. McRae was a 337 dealer at the time he testified that he tried to put in a pump of Standard gasoline and was told that he could not. That occurred back in 1942. Mr. McRae was not a 337 dealer first and then an L-O operator, as Mr. Dixon mentioned in his opening argument. Mr. McRae was first a lessee from Richfield at an L-O station, and he succeeded in going behind Richfield's back to the land owner and getting the underlying lease, so that on expiration of Richfield's lease Mr. McRae controlled the station. So then Richfield had a 337 contract with him.

Mr. McRae's testimony as to whether or not he be permitted to handle Star ·d gasoline, he said, was within 30 days after his lease .d I can't tell whether that was under his 337 basis or his L-O basis.

But more importantly, Mr. McRae was a most antagonistic and biased witness. He felt very badly toward Richfield due to some lawsuit when he went into the Navy.

Your Honor, there are 1,361 stations in this category under the 337 type of contract. That is in Defendant's Exhibit M-4. Out of that total number the Government was able to produce one witness, and he testified to an event that occurred in 1942, nine years ago.

The Government did offer testimony on the split pump proposition. They put in the 1938 letter. They put in the 1938 letter of Mr. Dinkins about pulling out of split pump [fol. 3275] accounts.

In Mr. Dixon's opening argument he made this statement on page 2099, from which I take it there is an inference that Mr. King is reputed to have testified that Richfield's policy against split pumps has continued to this time. Mr. Dixon stated—and this is on page 2099:

> "Of course, after that it was switched over, as your Honor knows, to a maximum, minimum arrangement, but the testimony of Mr. King in that respect is that from the time they started the no-split-pump policy back in 1938, after Government's Exhibit 9 was circulated, I mean that policy was made known, that the effect of all of these sales contracts has been that, regardless of the maximum-minimum provision, they have been 100 per cent Richfield petroleum products."

I submit that Mr. Dixon's statement in that regard was mistaken.

Mr. King's testimony appears on page 1873-1875, and that is in volume 13. He was asked the question:

> "It is a fact, is it not, Mr. King, that regardless of the provisions of paragraph 1 of Exhibit 5-D and paragraph 1 of Exhibit 5-G, that the dealer or purchaser of petroleum products, of gasoline, did in fact, while contracts of that type were in effect between the dealer and Richfield purchase his entire requirements of gaso- [fol. 3276] line from Richfield?"

Mr. King's answer was:

> "It has been our experience that while these contracts have been in effect that the dealer has purchased his entire requirements, though there are numerous instances where he has cancelled the agreement or otherwise abrogated it by ceasing the purchase entirely of our products."

In answer to the court's question—the court raised the question as to whether in those circumstances the dealer is obligated to pay for the cost of the painting, and Mr. King testified:

> "No, your Honor, that is not correct. In the first place he has, on the one hand,"—

I will paraphrase this—he has an obligation to purchase a specified quantity. And on 1875, he said:

> "And as long as he continues to purchase the quantity of gasoline as specified in the sales contract, even though he sold other gasoline, we would have no right to effect collection under the paint contract."

He said:

> "The only time we have ever effected collection under the paint contract is where he has stopped buy- [fol. 3277] ing entirely, and we are out of the station."

Mr. Bradford testified as to split pump policy in 1937 somewhere in Idaho. He recognized, however, a difference between L-O's—he did not testify to any split pump problem subsequent to 1937. He recognized the difference between L-O's and independents. He said, on page 85:

> "You don't tell those fellows to get rid of anything. You have to sell them."

He talked about the painting agreements and the effect of the painting agreements. Mr. Bradford was the Portland branch manager who testified about having the dealers take down their signs. He testified he did not ask them to take down their signs, but when he went around the station making up his painting requisition, the dealer went around in front of him in taking down the signs. That was not a new account. That was not solicitation of new business. Mr. Bradford testified that that was when he was putting a new paint job on an existing account and that he had that picture taken for the purpose of getting a painting requisition approved in his home office, and the moment the picture was taken, the sign went back up. And furthermore, that even when the signs were down, that did not take competitive products out of the station, and we are talking about the independent stations, of course.

Mr. Nicholson testified as to split pump. He had instruc-[fol. 3278] tions in 1937 or in 1938 against the split pump accounts in Seattle. He said he thinks it was the policy of Richfield to sell gasoline 100 per cent. He thinks maybe, perhaps, Mr. King and I may have discussed about our policy.

Mr. Nicholson has not been with Richfield since 1945. This testimony related to around 1937 and 1938.

Your Honor mentioned that Mr. Nicholson, himself, was so hazy in his recollection that counsel had to direct his attention by leading questions.

Mr. Duarte had a somewhat warped view of the painting arrangement. He called it a "painting lease." He did not recognize the instrument, he was not too sure of it. He admitted that the dealers handled competitive oils and TBA, and that Richfield could not stop them from it.

None of the Government's witnesses have testified to anything subsequent to 1946, and most of them around 1938 to 1941. And there has been only one 337 witness and that was in 1942, Mr. McRae.

No Government witness testified to any threat of cancellation of a sales contract. Of the total number of the Government's competitor witnesses, 25 of them, not one of them testified as to gasoline, and no one of them testified as to failure to sell any particular identifiable 337 station.

Under these circumstances I think the statement in the General Electric case, which is in 82 Fed. Supp., is par-
[fol. 3279] ticularly appropriate.

The Government's offer of proof is not impressive. I think the only part of the law that is applicable to this phase of the case is United States versus United States Gypsum Co., which is in 334 U. S. 364, where the Supreme Court reversed a finding of fact on a showing that was stronger than the Government's showing in this case, and stated that it reversed it because the finding was clearly erroneous under Rule 52(a).

We submit that insofar as the independent stations are concerned there is no proof whatsoever.

Would the court care to take a recess before we start on the L-O stations?

The Court: If you have reached a stopping point.

Mr. Paradise: I have reached a conclusion on the independents.

The Court: We will do that. I wanted to call attention to a statement. I had difficulty in finding it because I scatter my books all over the place, and I can go to them and find them but when I send somebody to find them I have got to describe what I want unless I identify it by volume.

In arguing about these cases we have to bear in mind the aim of the statute, and I think one of the best statements of the aim of the statute is in the last decision upon the subject by the Supreme Court. It is in Standard Oil
[fol. 3280] Co. v. Trade Commission, decided on January 8, 1951. Incidentally, that case was in that court for over a year. It was argued originally on January 9, 1950, then they could not make up their minds so they re-argued it in October, and finally decided it a year later. But this

is made by Mr. Justice Burton, who, as you remember, was a senator from Ohio for many years and was familiar with legislative history dealing with the antitrust acts. I think he was in the Senate when the Robinson-Patman Act was enacted. But this is a very brief statement. I am reading from page 248. This is the official volume 340. He said:

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'"

I think that must be constantly borne in mind when you consider these matters. That is why I have said in these cases and in other cases that whether a particular trade practice is good or bad, has good or bad economic effects upon the participants, or even on the public, is no concern of ours. All we have to determine is whether it is one of the practices forbidden by any of these three Acts, and [fol. 3281] if you find it, then that is all you are concerned with.

I try to bring this before us because there is a tendency throughout the entire country to feel that a case like this should turn into a question of policy. I have never allowed any case in front of me to turn into policy, because I have kept and I have tried more of them than anybody on the Pacific Coast—I think Mr. Dixon will verify that, both civil and criminal—I have tried to keep that constantly before me and, if you do not do it, you get lost.

I was reading one of the series of articles appearing in the Christian Science Monitor dealing with the Investment Bankers case, and I noticed something that made me smile. It seems that after months of argument, the judge trying the case made the statement, finally, that he agreed with the Government contention that whether this policy of restrictive bidding is good or bad for the investment banker has nothing to do with the case, and this financial writer thought it was a surprising admission. If he had been around this court, he would have known

that in the Standard and in every other case we try, because of the long familiarity of this branch of the law, we lay that down as the policy and do not allow anybody to deviate from it.

This is not criticism of either of the lawyers. There are some men of distinguished reputation. I met some of them there, Mr. Arthur Dean and some of the other men who are in that very case. But I think we are getting away [fol. 3282] from it. I think that is responsible for a lot of the propaganda that is going on in the newspapers through the advertising columns by some of the persons involved in these cases like the A & P case, spending millions of dollars. Even I get some of them through the mail. I got a sheaf that were printed that day, going on about the policy of the Government behind it.

That is a nice type of argument to make in front of a Congressional Committee which is discussing any possible modification of the law. It is no argument to advert to in a courtroom, either in one argument or another. And I am very happy to see that counsel in this case have not done it.

All right, we will have a short recess.

(Short recess)

[fol. 3283] The Court: All right, Mr. Paradise.

Mr. Paradise: We come now, your Honor, to the L-O stations, and this is the important and new phase of this law suit. The problem here is entirely different than the problem regarding independent stations, of course, both, in fact, as a relationship, but, more importantly, here I think the government and Richfield are in substantial agreement as to what the facts are, and here the problem is primarily a question of law.

The law involved, however, is Section 1 of the Sherman Act, pertaining to restraints, and Section 3 of the Clayton Act. There is no problem of monopoly, or intent to monopolize, or attempt to monopolize, or purpose to monopolize. None of those are charged in the complaint. Those are not in issue in this case.

The significance of the relationship between Richfield and the L-O operators is summed up on pages 36 and 37 of the defendant's original memorandum.

Before discussing the legal significance of the relation-

ship, I would like to state a summary of the salient factors pertaining to the L-O stations, what is Richfield's purpose in having them, and the nature of the relationship.

Now, first, as to what is an L-O station. There are four different kinds of L-O stations. Mr. Brower described them, and the four different types are outlined on Defendant's [fol. 3284] Exhibit W. They include four different categories: fee properties, where both the land and the facilities are owned by Richfield; where Richfield owns the facilities which it has installed on land which it has leased, and that is category B; category C is where lessors have built stations for Richfield under a long-term lease, and where the station is built to Richfield's plans and specifications; and category D is other stations that have been built by lessors, but not to Richfield's specifications, and on land leased by Richfield.

Defendant's Exhibit W, I feel, is quite important. It shows that of the entire 1343 L-O stations that Richfield has as of December 31, 1950, over 81 per cent of those stations were what is called on the exhibit "self-created stations." And "self-created" is defined in the exhibit in this fashion:

> "This phrase refers to those stations built by Richfield or by the property owner under agreement with Richfield on sites which had never theretofore been used or equipped as a service station handling any petroleum products."

Mr. King testified, and this is unchallenged, that in no L-O station does any operator own any of the land, buildings, tanks, pumps, or fixed assets of any nature, or anything except service station tools and his inventory of petroleum [fol. 3285] products and TBA.

Some question was raised as to the hoist that was installed by Mr. DeLonge at his station up in Reedville, or somewhere in Oregon, and we will get to that later.

The relationship between Richfield and the L-O operator is a combination of various factors, and I say this at the outset, that Richfield's contentions with respect to the L-O operators are not predicated on ownership as the sole or primary factor.

I believe your Honor in the Standard Oil Company case rejected the idea that a contract otherwise in violation of

Section 3 of the Clayton Act would be immune from the Clayton Act if it was contained in the sublease by Standard. Your Honor wrote a paragraph on that subject in the opinion.

The Court: It is surprising how many things there are in that opinion.

Mr. Paradise: However, that I want to point out.

The Court: One thing about it, I wrote it myself. I have no ghost writer. Furthermore, I do not even have a research clerk, so whatever I do I cannot blame on somebody else. If it is good, I am entitled to credit. If not, why, criticism is to be directed to me. I have no vicarious animal or person on whom I can throw responsibility.

Mr. Paradise: I give your Honor credit for that statement in the Standard case, and my criticism is directed to the [fol. 3286] government's attempt to apply it to our case.

The Court: I see. All right.

Mr. Paradise: In our case this requirement of exclusive dealing is not predicated, and our contention is not predicated upon the fact that we own the property. Ownership of this property, either by way of fee ownership or lease, is not the end-all. It is only one of a bundle of contributing factors that make up this relationship.

What else goes into this relationship? Well, it includes the manner in which these operators are selected, where they are selected from, who they have been with before, whether they have been operators, whether they have been independent dealers before, or whether, as the evidence shows, they, by and large and by the great majority, they have not been so. That they have not been taken off the market, that is the important thing under the Curtis Publishing Company case. We select them by virtue of certain qualities. The testimony, as you are aware, as we get into that, shows that particular qualities are searched for when these men are interviewed, and these qualities are matters of reputation, of integrity, and family, and things of that sort, matters far different from a relationship as between a seller and a customer, if these men be compared with the independent dealer to show in reality the difference between them. These men, by and large, sign employment applications. Not that they [fol. 3287] are employees, but they state their qualifications

and give character references. Those are not earmarks of a purchaser and seller relationship, as the government would have the court believe. These men are told and instructed that before they can occupy this station they must comply with a multitude of things pertaining to operation, including, of course, the requirement that they handle nothing but Richfield products. There is testimony of other factors, including the training and constant supervision and control over them, and Richfield's purpose in having the stations operated in a particular manner, not as a landlord, but because Richfield is a marketer of petroleum products, and indirectly of tires, batteries, and accessories, although it does not manufacture them. All of these things will be developed, and they are all pertinent to the overall problem of the relationship, and the fact that, in view of that relationship, this relationship is not cognizable under either the Sherman or the Clayton Acts.

Now, taking up these factors one by one, first, what is Richfield's purpose in having these L-O stations?

Mr. King testified as to the basic underlying purpose. Richfield cannot depend, he said, on a sufficient volume of business from independent dealers to maintain a stable market. Richfield is constantly competing against other petroleum marketers for the business of those independent dealers, but it is also constantly losing accounts of inde-
[fol. 3288] pendent dealers, and that is in the testimony, as well as in the exhibits.

Richfield's primary purpose, therefore, has been to create an outlet for its products. It cannot find enough independent dealers to do business with for this purpose. Mr. King testified that the need for this outlet has greatly increased in the postwar period, due to four separate and distinct factors. One was the enlarged refinery facilities which were constructed during the war. The court will recall the testimony and evidence pertaining to the fact that this was done at the request of the government. Richfield's refinery capacity for the manufacture of motor gasoline prior to the war was increased during the war by these new facilities to the point that when these new facilities had been completed, at a cost of some eighteen to twenty millions of dollars, Richfield's capacity for the manufacture of motor gasoline had been increased by 32½ per cent.

The second factor was the discontinuance by the government at the expiration of World War II,—not the complete discontinuance, but the very radical cut-down in purchases. Mr. Day stated that the quantity of gasoline that was taken that was being currently manufactured by Richfield was chopped down the day after V-J-Day from 17,000 barrels a day to two to three thousand barrels a day. Taking the difference between 17,000 and 3,000 we have 14,000 barrels per day of discontinued purchases. That 14,000 barrels per day, I call to your Honor's attention, is 17½ million gallons [fol. 3289] per month, and that is the volume that would require more than 2,000 L-O units at that time to sell per month.

Your Honor will recall Mr. King's testimony that the average gallonage in an L-O unit at that time was 6800 gallons per month, and that it has been increased by 60 per cent to the end of 1950, the general average throughout the country.

The third reason was the discovery by Richfield of new oil fields, which provided, of course, more crude oil to be refined. The fourth reason was—by the way, while we are on the subject of the discovery of new oil fields, that must be borne in mind in connection with Mr. David Day's testimony, that subsequent to the end of the war the refinery capacity was again increased by removing bottlenecks from 43,000 barrels per day to about 48,000,—I think either 47 or 48.

The fourth factor given by Mr. King is the increased need by Richfield for outlets, is the increase in the demand for petroleum products due to the increase in population, and he testified that sales generally in 1950 were 60 per cent in excess of the sales in 1941.

I call the court's attention to the defendant's exhibit M-13, which gives statistical data concerning the increase in population and the increase in motor vehicle registration. All of these matters show that the purpose of having, creating, [fol. 3290] and operating L-O stations indirectly through these operators provides a good business purpose, a valid business purpose. The matter of having L-O stations is, in the words of Mr. Justice Jackson, I believe it was, a device to wage competition, not a device to suppress competition.

Mr. Dixon, in his opening argument, in referring to the

L-O stations, refers to this as a monopoly, and that these are monopolistic practices. Setting aside for one moment the fact that Section 2 of the Act is not involved, and using "monopoly" in its broad sense, this is no monopoly whatsoever. Monopoly implies harming your competitors, suppressing competition. There is no suppression of competition here involved.

This is the matter discussed at great length in the Columbia Steel case, where it was pointed out, and it was also referred to in the Paramount case, and the Yellow Cab case, that a valid business purpose is to be distinguished, on the one hand, from a purpose to destroy and suppress competition, on the other, and I submit that our showing in this case shows most emphatically and without dispute the valid business purpose here involved.

Mr. King also testified as to the steps that have been taken to satisfy that increased need. He testified concerning this twenty-odd million dollar budget in 1946, which was adopted by the Board of Directors, and which Mr. King himself helped prepare, at the direction of Mr. Dinkins, who was the [fol. 3291] vice-president.

He testified that the expenditures started in 1946, and have continued to date, are still continuing, and that pursuant to that budget, that twenty-odd million dollar budget, that the greater number of properties which were acquired, 90 per cent of them, were unimproved sites and vacant properties, and the balance were existing service stations, I think he said.

The important part, from the standpoint of the government's charge as to whether there is a monopoly and monopolistic practice here involved, even though there is no such issue, is Mr. King's testimony that in spite of the expenditure of that money there has been no increase in the number of Richfield's L-O units in the last 10 to 12 year period. He showed, and Defendant's Exhibit M-4 will show that Richfield has fewer L-O stations today than it had in 1940 or 1941. Mr. King explained the reasons for the fewer number of stations: obsolescence, failure of renewal of leases, highway changes, and so on.

The next important factor in this relationship, going beyond Richfield's purpose in having L-O stations, is the

source of the operators. Where does Richfield get them, and who are they?

Applications are filed by various persons seeking service stations. Some of the government's witnesses testified that [fol. 3292] they were looking for stations, Mr. Cooper and Mr. Pierce, both L-O operators, and they said they were looking for service stations, and that Richfield's practice was to limit them to operate one of Richfield's stations. [fol. 3293] Mr. King and Mr. Dusto also testified that another source of operators is helpers in other service stations, salaried employees in other service stations. And Richfield obtains them by advertising and then gets them from businessmen.

Mr. King testified, on page 1698, that few, if any, operators were independent dealers in Richfield's stations before becoming L-O operators. That, I think, is particularly significant in the light of the Curtis case, where there was sharp differentiation made. In the Curtis case, the court will recall, that was a Federal Trade Commission case. The Commission's complaint originally covered 1,535 wholesale dealers. The Federal Trade Commission found a violation of Section 3 of the Clayton Act as to 447 of these dealers who, prior to this relationship with Curtis, had been regularly accustomed to dealing with Curtis's competitors.

But significant, too, for this purpose, is the fact that even the Federal Trade Commission found that there was no possibility of attack as to the balance of the 1,535 who had not been engaged in this business prior to their relationship with Curtis. That case is discussed on pages 21 and 22 of our original memorandum.

The next factor is the qualities in which Richfield is interested. As I mentioned, business, character, stability, reputation in the community. Mr. King expressed it: [fol. 3294] "People who will be a credit to Richfield in meeting the public."

Mr. Dusto says: "We attempt to find the best possible type of man to do the best job we can with these L-O stations."

The Government's witnesses testified the same concerning the qualities of L-O operators. I refer to the testimony of Government's witnesses Mr. Minor and Mr. Pitman.

Not that these men, the L-O operators, become employees of Richfield, but it is significant to note as to whether or not these men are customers of Richfield, whether this is strictly a buy and sell relationship, these men make out employment forms and show their qualifications. I refer the court to the forms attached to Defendant's Exhibit A, which is the stipulation of facts with the Government. These forms are used by the prospective operators. That was testified to by Mr. Dusto. It was also testified to by Government's witness Mr. Minor, the merchandiser, and Mr. Delucchi, one of the L-O operators that testified that he made out one of these forms, and the form he made out is Defendant's Exhibit K.

These operators after they are in a station, and even before they are in a station on some occasions, are told of promotions, and actual instances of promotions from one station to a better station occurs.

[fol. 3295] Mr. Delucchi was a helper in one station and was given a station of his own to operate.

Mr. Dusto, on pages 1930-7-8, testified as to various instances of promotions, and said there were various others, that he was not called upon to enumerate.

Mr. Bowe, one of the Government's witnesses, was an L-O operator and he was promoted not to another L-O station but to a salaried job with Richfield as a merchandiser

One of the most important phases of this relationship is what these prospective operators are told when they have been approved as prospective operators and before they are installed in the station.

Mr. King testified as to this in some length. So did the various Government witnesses, the merchandisers, Mr. Shewbridge and Mr. Pittman and Lieutenant—I have forgotten the lieutenant's name.

Mr. Hall: Weston.

Mr. Paradise: Lieutenant Weston. There was another operator whose name I have forgotten for the moment.

But Mr. Dusto testified in detail as to the various aspects, and I think his testimony shows a summarization of all of them, and these are the factors which are called to the attention of the prospective operator by the merchandiser and that this is uniform practice throughout the company in all three divisions.

[fol. 3296] First, as to the uniforms, the prospective dealer is told it is a requirement that he must wear a uniform.

I won't refer more to Mr. Dusto, his testimony, I mean, individually on each item. His testimony on these phases starts on page 1920 and goes all the way over to 1947. So all this testimony is from Mr. Dusto, but it summarizes all of the testimony that has come in on both sides.

After the matter of uniforms, the matter of the number of employees. The man must have a minimum crew sufficient to take care of the operations of the station.

The matter of the hours that the station is to remain open in order to produce the maximum business. That is told to the man. The man is instructed as to his personal cleanliness and appearance.

Mr. Dusto said, "A great deal of emphasis"—and here I am quoting:

> "A great deal of emphasis is laid on the fact that he has to come to the station clean-shaven and change his uniform as often as necessary to present a good appearance when he contacts the public."

He was instructed as to the pump island procedure and his manner of dealing with the public and the way Richfield wanted him to.

The merchandiser solicits business for the station. I am [fol. 3297] going to refer to that again when we come to this question of goodwill and whether this man has any goodwill. The merchandiser solicits the business for the station.

This man who was a lieutenant from Arizona, Lt. Pittman, testified that he made over a thousand calls with operators in the neighborhood of these stations, trying to develop business for the station.

The Court: That is at the inception.

Mr. Paradise: Yes, that is right. There is the instruction, of course, concerning handling Richfield petroleum products exclusively. That the TBA should be bought from the local distributor if the latter is able to supply the operator, and the TBA should be the approved TBA.

And Mr. Dusto gave the reason that is told to the operator. He said, on page 1924, that the merchandiser is in-

structed that when the question comes up as to the reason why the man has to handle Richfield products exclusively, if there is a question raised by the prospective operator—and this is his testimony I quote:

> "To tell the prospective operator that Richfield created this station for the purpose of selling its own petroleum products, and we did not build the station to provide competition a place to do business."

Mr. Dusto testified that there are instructions to the operator as to how to order petroleum products and place [fol. 3298] orders. He is instructed as to the credit card procedure. He is instructed that there are to be no unapproved merchandise, and he is instructed why there are to be no competitive signs—not limited to the surface of the building, but anywhere on the service station premises, no curb signs of any sort.

The Court: Give me the page of that. I want to make a note of that.

Mr. Paradise: I beg pardon?

The Court: Give me the page.

Mr. Paradise: I am talking now from 1925-27.

The Court: I just wanted the page when you got through. That is a very good summarization of instructions and I wanted to put it down. All right.

Mr. Paradise: The operator is instructed to attend meetings when they are called. He is instructed concerning the merchandise in the station by the merchandiser. He is instructed to buy certain things from the outgoing operator.

The merchandising of the station I will get back to, but I want to emphasize what he is instructed as to what he can buy and what he should buy. He is instructed that he must buy certain things from the outgoing operator. He is instructed that he must buy Richfield petroleum products, and not others. He is instructed that he should buy salable approved TBA items at wholesale, and not to buy non-approved TBA items. He is instructed to buy approved [fol. 3299] service station equipment, which is lube units, and he described there are three brands which are approved as Standard tools in Richfield stations, and he buys those from the outgoing operator at the depreciated value.

Equally important is what he is told as to Richfield's obligation when he is terminated. Richfield sees to it that the approved items will be disposed of to the income operator when the outgoing operator leaves, the approved items only.

Mr. Dusto said this, or I think this is Mr. King's statement, to enlarge on Mr. Dusto's statement at this point:

> "Generally the incoming operator takes over the inventory equipment at values previously mentioned."

This is page 1712. Mr. King said further that:

> "If for any reason the station is not maintained in operation, in other words, if an operator is not being immediately checked into the station, then in that case Richfield would credit his account or take the merchandise back."

I think it is appropriate at this point to break off from Mr. Dusto's testimony and discuss the matter of Mr.——

The Court: Just a moment. I was just checking on the time and I wondered if you wanted a recess now.

Mr. Paradise: Yes, thank you, your Honor.

The Court: That will give you about two hours, then we can finish this afternoon, gentlemen. All right, 2:00 o'clock.

[fol. 3300] (Whereupon, a recess was taken until 2:00 o'clock p. m. of the same day, Wednesday, June 6, 1951.)

[fol. 3301] Los Angeles, California, Wednesday, June 6, 1951 2:00 P.M.

The Court: All right.

Mr. Paradise: I think the last matter I mentioned this morning, your Honor, in relation to Mr. Dusto's testimony as to the large number of items on which the prospective applicant for an L-O station is instructed before he takes over the premises is the matter of what Richfield will do in connection with the disposition of his inventory of petroleum products, that is, the Richfield's petroleum products, his approved TBA and his approved service station equipment.

Mr. Dusto also mentioned that the operator is instructed on the stocking plan, how to stock the station with petroleum products and TBA.

Then there were instructions on the next topic, to use the colloquial phrase that is used in the trade, of "no blue skies." Mr. Dusto testified that "blue sky" means the payment for goodwill. The merchandiser is instructed to see to it that no money changes hands other than the exact value of the merchandise and the equipment, no "blue sky."

In other words, the operator, the incoming operator, is not permitted to pay anything for goodwill, a changeable factor, nor is the outgoing operator permitted to sell any. Both of them are in on a 24-hour basis and there is no goodwill [fol. 3302] factor to be built up or which could be built up which is a salable item by the operator.

Mr. Dusto testified that, as to the reasons for that instruction, he said—and I quote from page 1934:

> "Because the outgoing operator has nothing to sell other than his merchandise and equipment. He has no goodwill."

The subject matter of goodwill was commented on yesterday by your Honor during Mr. Dixon's argument, and I would like to take time out for a moment and discuss your Honor's statement. On page 2079 of the transcript your Honor said, in commenting on this relationship:

> "He (referring to the L-O operator) has no interest in the goodwill that he builds up. We"——

the word is "we" but I think it meant "Richfield" can. "We," I think you were personifying Richfield.

> "We can destroy it in 24 hours, and we can destroy his property values by saying to him to take his junk out of the station, except such as we tell the man we choose to take. We will not recognize any man he recommends, even though the man would give him $5,000 or $6,000."

I would like to point out, solely because this is the DeLonge case to which your Honor was referring, was such a hardship case, that there are a lot of mitigating things concerning that.

[fol. 3303] The Court: I was trying to state your position in its most extreme form, only to point out the absoluteness of control that you claim to exercise, you see, so far as the L-O station is concerned. In other words, I was putting your position as strongly as it can be put, without any reflection on the methods. I did not mean to criticize methods at all.

You notice how they (transcripts) pile up here. You can always watch them go up. I never look at them when I leave, because I don't like to look at them until later on when I want to refer to the transcript to clarify my thought.

And I was talking to the proposition that, to use the language of the street, you are not making any bones about the control that you exercise over the L-O stations.

Mr. Paradise: That is correct, your Honor.

The Court: That is the point I was making to Mr. Dixon. And I think your argument today emphasizes it, and I think you agree with me that, so far as those stations are concerned, it is purely a question of law whether that is a type of relationship that can be considered independent for the purpose of applying the rule of the Standard case.

[fol. 3304] Mr. Paradise: Perhaps it was just a matter of phraseology, then, the same as it is in the record.

The Court: Don't trip me up on a little phrasing.

Mr. Paradise: I think it went a little deeper than that.

The Court: After all, in a long case, in the course of discussion there may be an unfortunate use of language, and if you imply from my language a criticism or an attempt to use that extreme case as typical, why, I will state it was not so intended.

Mr. Paradise: That is not precisely what I have in mind. We assert, as you just stated, that the control is absolute. The part that I felt was not precisely accurate was this: It is our position that the man never does acquire any good will, rather than that he does have his good will that was built up and then Richfield deliberately destroys it. There never was any is the point, and, as I say, that may be a matter of phraseology.

Now, your Honor's reference to the merchandiser, Mr. Knudson, suggested that I make mention of Mr. DeLonge's testimony in a couple of matters. Your Honor inquired whether Mr. Knudson did not know that Mr. DeLonge had

originally bought the repair tools and garage equipment with Richfield's knowledge, and Mr. Knudson said he became a merchandiser after Mr. DeLonge was already in the station. Mr. DeLonge testified that before he went into the [fol. 3305] station he was told by this same man, Mr. Kisor, —I think he told Mr. Kisor that he could buy a half interest in the station and in this partnership for $3,000, and he testified on pages 1164 and '65, and on page 1202, that before he laid out any money whatsoever to the former operator, a Mr. Million and his partner, that Mr. Kisor told him not to pay anything for good will, that he told him if he waited a week, he could get it for nothing. Mr. DeLonge testified that he didn't want to do business that way, and he wanted to make some payment to these men and Mr. Kisor said, "I don't know what you are paying for, but go ahead if you want to."

Mr. DeLonge also testified that this loss that he suffered in the end, this $5400, did not include anything for good will, that he realized he had no good will to sell.

Then I think it is important that Mr. DeLonge, even though his was a hardship case, was the one who wanted to get out. He testified that a month before he left the station he told Mr. Knudson that he wanted to get out, that the work was too hard for him. That appears at pages 1221 and '22, and in Mr. Knudson's testimony at page 1958. The loss he took, that Mr. DeLonge suffered, in the end was not over $550 for unauthorized merchandise, that the things he failed to sell to Mr. Winters, the incoming purchaser and this automatic radiator man, amounted to $3,000 to $3500, and those [fol. 3306] were garage and repair tools that Mr. DeLonge bought on his own and Richfield had nothing to do with.

The government put in its Exhibit 20-A, which is a report to Richfield's division manager, Mr. Kirby, and I think that Exhibt 20-A, which the government saw fit to put in as its exhibit, is pertinent. It outlines what Mr. DeLonge's claim that he litigated against Richfield was, and which he stated ultimately broke him financially. One of the items was for salary, and he considered himself an employee of Richfield, he was claiming salary for himself and his helper. I would like also to point out, and solely for the purpose of Richfield's good reputation in this matter, that that claim did not include the $100 per month that he testified went to Mr.

Kisor, and which Richfield very much regrets, but never knew about until Mr. DeLonge took the stand.

I thought it was appropriate, your Honor, to mention that in connection with the discussion of blue sky and good will.

Now, getting back to the items that Mr. Dusto testified are covered with the prospective applicant for an L-O station, the matters on which the applicant is instructed, he testified that this Form 542——

The Court: Just one minute.

Mr. Paradise: Pardon me.

The Court: Go ahead.

[fol. 3307] Mr. Paradise: He testified that the 542 lease is discussed paragraph by paragraph. He testified that the reason for the 24-hour clause is always discussed with the prospective operator. By the way, that 24-hour clause came into the 542 form in 1941, as shown in Government's Exhibit 1-B, and not in 1943, in Government's Exhibit 1-D. It has been in use consistently since 1941, and the use of it is described and discussed in the stipulation of facts, which is Defendant's Exhibit A.

Mr. Dusto also testified to the Richfield rental policy of charging one cent per gallon, and he testified further and explained the flat rental policy, and the reasons for it.

The matters and items which are explained to and discussed with the prospective applicant were summed up rather briefly, but fairly well, by the government's witness, Lt. Pittman, and I think his language is particularly interesting. Lt. Pittman, you will recall, was a merchandiser who dealt with L-O stations in the Arizona territory. He said on page 546:

> "I see that the dealer is in uniform at all times, that his station is kept properly policed,"—and, by the way, although he used the word "dealer" these are L-O stations only that he is talking about. He said, "I see that the dealer is in uniform at all times, that his station is [fol. 3308] kept properly policed, that is, that it is kept clean and operated in an orderly manner, that the dealer himself is acquainted with our products and he is acquainted with the servicing of his customers' cars. In other words, that he knows what he is doing in the station as far as service is concerned. That he is operating

reasonable hours to service his neighborhood or his trade, that he maintains a degree of loyalty towards our company. I think that would pretty well summarize it."

That was Lt. Pittman's statement, and I think the use of the word "loyalty" is significant. We have asserted there is an intimate relationship between Richfield and these people, certainly far more than a relationship of buyer and seller, as the government contends, and the reason for that intimate relationship is discussed in various of the authorities cited in our memorandum, the printed memorandum that was filed originally. Mr. Dusto also testified——

The Court: The only thing is this: I have read that memorandum several times, and I have studied some of the cases, and I don't find any case there that creates a new relationship apart from the recognized relationship. The farthest they go is to use the del credere relationship, that is, where a factor is responsible for the losses to his principal, then [fol. 3309] he assumes a relationship, a del credere relationship, a fiduciary relationship which, while not partaking of that of an employee, gives him a specific status. But I do not find in any of those cases any intimation that you can take an ordinary leasehold relationship, whereby you put a man in possession of property, have him assume responsibility for what he sells, but you controlling the products he sells, you having the right to terminate his leasehold upon short notice for non-compliance, you regulating his private conduct to the extent of seeing that he is clean-shaven, and that he wears clean clothes, you insisting that he acquires nothing more than a tenancy by sufferance, you see, which cannot develop into good will, and by merely imposing those conditions overcome the fact that his relationship carries with it responsibilities of his own that far exceed the control that you exercise, because your control is merely a power to terminate at your will.

[fol. 3310] Supposing you employ a man under the "shotgun" contract, that is, provided that he is employed so long as his work is satisfactory. He does not cease to be an employee by the mere fact that you can terminate it immediately. And the courts have held that there are contracts which provide for direct employment for a definite time, and yet contain a clause that those may be terminable

if the services of the employee are unsatisfactory, which merely puts the employee at the will of the employer so far as the term is concerned.

But I know of no law, no case which says that that relationship ceases to be one of employer and employee. Do I make my point clear?

Mr. Paradise: Yes, indeed, your Honor. I am going to develop that fully in my law argument on this, and I have just a few more statements to make concerning the facts of the relationship, and I am pleased to have your Honor's remarks about that, because I want to devote my argument to that point particularly.

I appreciate that that is the crux of this entire problem insofar as the antitrust laws are concerned.

These other facts, before we get to the law, are pertinent to the——

The Court: Another thing is this: I have read that brief and you do not help me by repeating what is in the brief, because I am not going to decide this case from the bench, [fol. 3311] you see. I will give you notice of that, although I could decide it from the bench. I have done that before in cases as important as this one, but this case requires some additional work before I can decide it. And, frankly, I have not read all the exhibits in the case in full. So I will have to do additional work. And in view of the fact that you have a written statement, I would prefer that instead of reading to me statements, you merely emphasize something that is already there, because I have read it. Of course, I realize that that is written in anticipation. That is why I pay very little attention to a brief. I have never penalized the lawyer yet for not filing a trial brief. They are helpful at times. Of necessity you anticipate what is going to develop, and that is why I like oral argument, because we can direct a discussion into the proper channels.

So it will be helpful if you merely emphasize some of the points, rather than to use up your time in repeating what is already there and what I will have to re-read before I decide this case.

Mr. Paradise: Thank you, your Honor.

The Court: I will probably write an opinion in the case, too, and bearing in mind that I cannot take two or three weeks off to write it, you have got to make my work as

easy as possible because I have to do it in between. You get out today and tomorrow we are occupied with the hearings, [fol. 3312] and Friday I am going down to San Diego and Monday I have another long day, and on Tuesday I begin trial of a civil antitrust case. That is the way our work goes. I am not complaining. I chose this job. I was not asked to take it. I asked for it.

But I am saying that so as to perhaps save time where the doing of things would be merely repetitious of what is already in the record.

Mr. Paradise: Thank you, your Honor. I had no intention of rearguing all the matters in our brief. We have taken the liberty of following your Honor's suggestion at the close of the presentation of evidence. Your Honor suggested that if we had any additional authorities, to submit them.

The Court: That is right.

Mr. Paradise: We do have additional authorities. They are not antitrust authorities but we suggest that they are most and are particularly pertinent to the proposition or the problem that your Honor suggested as to the relationship of this L-O operator to Richfield and the definition of the relationship.

To wind up the statement of facts as to which there is but little, if any, dispute between Richfield and the Government, there is the problem of the procedure on check-in which Mr. Dusto also testified to.

Now I am directing my attention to the record from pages [fol. 3313] 1936 to 1939. Mr. Dusto testified that the standard procedure is that the prospective operator signs this 542 lease before he does anything else.

It was suggested in the Government's opening statement that two operators—I think they were Mr. Smith and Mr. Ellena—did not know—no, that was not the statement. The statement was made that they could have the property on a long-term basis. I do not think that the Government intended to suggest that there was a deviation from the 24-hour clause or suggestion that the 24-hour clause was being waived.

Mr. Ellena testified he was thoroughly aware of the 24-hour clause, and Mr. Smith, the L-O operator from some-

where near Long Beach, testified that, if I recall his language properly, the Richfield man said he hoped he would be in there for some time, and he would be so long as he played ball with Richfield. Mr. Smith said that he was often caught off first base, to use his language, in the handling of competitive merchandise.

Mr. Dusto also testified as to what the merchandiser does with the prospective operator when he goes into the station. The merchandiser is instructed to spend a minimum of five days with the operator in instructing him as to the detailed operation of the station, the manner of it, and thereafter he calls on him either from two times a week to once a month, depending upon the operator's ability.

[fol. 3314] The merchandiser is instructed to use Richfield's form 1071 as a training guide. And your Honor will recall Exhibit V, which is a series of printed forms containing detailed instructions on the myriad of individual items of procedure that occur in economically handling the operation of the service station.

Mr. Dusto also testified concerning the proper use of Form 205, that is, that service station survey, the grading of L-O operators, and that the form is used every 60 days by the merchandiser with each L-O operator.

He talked about the termination of L-O operators, both the circumstances justifying the termination and how it occurred.

Mr. Dusto testified that the operator is not terminated for his first infraction of the rules, and that that is standard procedure by the company to try to make the man satisfactory.

I think that is sufficient, or is directed to the rebuttal of any suggestion by any of the Government L-O witnesses that the man was thrown out the first time he failed to comply with instructions.

Mr. King testified to the same effect, on page 1711. Mr. Dusto's testimony is at 1943.

Mr. Dusto testified concerning the circumstances under which a merchandiser would recommend the displacement [fol. 3315] of the operator, and that consisted of several things: Limited operating hours, insufficient crew, inability to maintain inventory, a dirty station, absentee operation. And then when he forgot it, he did mention in response to

your Honor's inquiry that certainly also failure to carry Richfield products exclusively, that he had overlooked that one.

He testified that everything that he has said constituted standard practices throughout the company.

Mr. Dusto, you will recall, was in charge of the merchandising for the central division. He said he had counterparts in the other divisions, and that these matters that he testified to were standard practices throughout the company.

There is one other matter that I do want to refer to before we pass to the law, and that is the problem of financial assistance and the types of it which have been extended by Richfield to the operators. This, I feel, is pertinent to the relationship because it goes far beyond the relationship of seller and customer which the Government would try to have the court believe that that is the relationship involved.

Mr. King testified about these four different things, from 1699 of the record for several pages thereafter. And the first is the matter of rental reduction.

Rentals were reduced to a dollar per month at various instances. Mr. King's language was this: Rentals are [fol. 3316] reduced—and I quote:

> "Whenever the operator experiences difficulty in developing a satisfactory volume of business, also to assist the operator in establishing a satisfactory volume at a new outlet, whenever it is necessary to assist him in operating the station."

The second type of assistance was loans to operators up to $2,500 so that they could carry adequate merchandise. And Mr. Dusto also testified that these loans were for truck deliveries.

Mr. King testified that another important thing furnished to the L-O operator is this valuable facility, this investment of Richfield's which may be from $25,000 to $35,000, and, to use his words: "A property that would be far beyond the average individual's ability to acquire otherwise." See page 1704.

Mr. King testified that those facilities are furnished to

the L-O operator at less than their fair rental value, and I think here, again, that is a most significant fact.

You will recall that the operator pays a cent a gallon, never more unless there are super facilities such as super buildings and parking lots and so on, for which an additional rental may be charged, and those are the extraordinary stations—one cent a gallon.

Mr. King testified that that is substantially less than [fol. 3317] what Richfield would collect if these stations were put on the open market on a rental basis without any limitation as to the type of product, not a long-term basis. In other words, if you compare what the L-O operator rents it for and what the fair rental value is for a fully equipped station, the L-O operator in recognition of the fact that he is required to do all these things—operate it the way Richfield wants him to, operat- it with Richfield's products, for Richfield's benefit—he gets it at much less than the fair rental value.

Mr. Brower testified that the fair rental value of a fully equipped station is not less than one and a half cents per gallon and the trend is upwards from that. One and a half cents is the minimum.

I call the court's attention to Defendant's Exhibit AA which shows the excess of rentals paid by Richfield on certain L-O stations over and above those received from the L-O operators. The court should realize that the L-O stations there referred to are not their fee owned stations. This is merely a comparison of rentals received and rentals paid on the particular stations which Richfield has rented. So you have a comparison of rentals payable and rentals received on the same stations.

The fourth type of financial assistance extended to the L-O operator—mind you, these have no bearing and no [fol. 3318] counterpart with the independent dealers—is the subsidy letter, which is Exhibit F. That subsidy letter is given to maintain L-O operator's margin during price wars when he meets competition of other stations in his area. This subsidy letter was distinguished sharply by Mr. King from the so-called extra margin letter which is given on occasions to independent dealers, the 3-C's and the 337 dealers, when necessary to meet the competition of

Richfield's competitors or competitive suppliers. The subsidy letter was Defendant's Exhibit R.

Mr. King also testified, you will recall, that this extra margin letter that is given to the independent dealers is never given to the L-O operators. He said—and I quote from page 1891:

> "There is no need to. We are not competing with any other oil company for the business of the L-O operators."

So finally, we come now to the discussion of the law that is applicable to this relationship and what it consists of.

The Government recognizes, as it must, and I gathered from Mr. Dixon's opening statement that it still recognizes these are essential features of the Government's case in so far as the L-O operators are concerned.

One, that the operators are independent businessmen. [fol. 3319] And two, that this is a market which Richfield has foreclosed its competitors from reaching.

We think it significant that neither of those factors is present in the light of the facts and the relationship existing between Richfield and the L-O operator. And by those facts I mean all of the various factors I have discussed: Richfield's purpose in acquiring the stations, the manner in which the operators are selected, the fact that these operators were not in the service station business as independent dealers before they became Richfield L-O operators, all these control items, the matter of what is told to them before they go in, what is expected of them, and the supervision, training, and instruction in the matter of Richfield's obligations in respect of taking their products back, the fact that they have no goodwill, no interest in the fixed assets of investment, and no investment of any nature in the business or in the property, and an interest solely in the merchandise and the standardized tools.

Your Honor in questioning me just a few moments ago concerning the significance of this relationship referred to the power. I submit to the court, and under the cases we will discuss shortly, that this is not just a matter of economic power and compulsion through the use of this 24-hour clause.

This is a matter that Richfield and these operators have [fol. 3320] bargained for in advance, before the operator went in. I do not say that this is a matter of agreement, as Government counsel says it is.

Mr. King testified no oral agreement is made with the L-O operator. He said the L-O operator comes in here and we tell him the conditions on which he is permitted to take this station. We tell him this is what he is required to do if he wants this station, and we furnish it to him at far less than its fair rental value.

I say that he is told, and the evidence is undisputed that they all knew before they went in, that they were in there at the sufferance of 24 hours.

The Court: That is not the point. The law declares contracts which are in restraint or in violation of law, regardless of the agreement of the parties, no question of compulsion, no compulsion enters into it. Supposing they agreed on the most formal conditions. The contract would not be any less violative of the law with respect to restraint of commerce.

Mr. Paradise: Perhaps I misunderstood your Honor's former comment. I thought you were distinguishing between the right to control from the power to control. And I say—and some of the cases which I cite and which are not in our original memorandum, have discussed the question of economic compulsion resulting from the power to [fol. 3321] put the man out of business. Where there was no recognition of the fact in advance——

The Court: You put him there in the first place.

Mr. Paradise: Pardon me?

The Court: There was no recognition at the time you put him there in the first place, is that it?

Mr. Paradise: Where the man did not understand in advance.

The Court: That is not the point. I am not interested in that. We are not concerned with the question of the voluntary character of this arrangement. It is the results insofar as commerce is concerned.

Bear in mind this statute as passed and the Sherman anti-trust law has almost become respectable by age. It was passed in 1890. General Sherman—no, Senator John L. Sherman—that is right, Senator Sherman said that his ob-

ject was to maintain—they did not use the word "free economy" at the time—to maintain competition and maintain relationships between persons who are in the same market upon a fair basis.

He felt that the only way it could be done is to denounce certain practices that had grown up.

In writing my recent opinion on the Patman Act, in one of the footnotes I wrote an essay on the history of the Act because I did a lot of research. I have quite an extensive [fol. 3322] library of Economics at my house, and I wrote quite an essay, citing a great variety of writers, from Professor Schlesinger to Ida Tarbell, who are in various books dealing with anti-trust agitation, and Professor Faulkner, who is the author of a text which is taught in colleges on the Economic History of the United States. I traced the origin of the statute and how it came about. It was not conceived in the hot-headed mind of some agitator. It was of the most conservative element in the Republican Party which controlled both congressmen at that time, including the famous Senator Hore. In fact, Senator Hore claimed he had more to do with it. He was the man, incidentally, who was behind McKinley when McKinley was elected. He complained afterwards: "I don't know why Sherman gets to attach his name to that statute. I had more to do with it than he had."

So we are dealing with a statute that has been on the books for 50 years, or over 50 years—for 60 years. Am I counting right? Yes. And which has been before the courts on various occasions, which expresses a particular policy.

And the statute says: "Contracts which shall be"—and, of course, they had in mind contracts that may be voluntarily entered into, because if it were enough that the contract were involuntary, it would be very easy to say that the statute is not violated. And the courts have gone very far. Look how far they went in this Schwellinger case—is it? [fol. 3323] the fair trade case, Schwellinger v. Schenley. Why, they invalidated the fair trade statutes in 45 states.

Mr. Dixon: 44.

The Court: 44 states, by saying that these are price-fixing statutes. And they had declared in the Socony-Vacuum case and other cases that price-fixing is illegal.

Here are agreements entered into under the aegis of the

state, and yet the Supreme Court says: No, no. You can't do that.

A very interesting case arose in a case of mine. Incidentally, I was the means of bringing about the first declaration of the Supreme Court that the state may be guilty of violating antitrust law in the Brown case. It was a three-judge court, and the State of California had instituted raisin control and it came before a three-judge court and I was one of the judges. Judge Stephens, Judge Cosgrave, and I sat in. We consented to enjoin Brown, who was the state administrator, from enforcing it. I dissented from my brethren. I held that until the raisins went into interstate commerce they were subject to state control. The case went to the Supreme Court. I am happy to say that the Supreme Court agreed with me. They do quite a number of times. You noticed the other day they did in the Hardiman case, Hardiman v. Collins, the Legion raid where I held, although a Legionnaire myself, and although I do not [fol. 3324] approve hoodlumism, whether it is done by Legionnaires or others, that the remedy is a state remedy and not under the federal but state law.

[fol. 3325] So the Circuit Court reversed me, and they reversed the Circuit Court and held I was right, that the civil rights statute did not apply to cases of persons who do not act under state authority.

So in this particular case they took my view, but one very interesting thing happened in the case. When the case was argued, Chief Justice Stone raised the question as to whether the statute covers state violation of the antitrust law. Now, that was not argued before me, I mean as a court, because the only question before us was whether the regulation was constitutional or was an infringement of interstate commerce. So they put the case over for reargument. They continued the matter. I told the Attorney General that if somebody had answered the question quickly, it would not have been submitted, because it could not be raised in that particular action, because it was not an antitrust action brought by anybody, that there were only three kinds of actions that can be brought under the antitrust law, that is, an action like this, a criminal action, and an action of injury by a third person. I told the Attorney General, "Why didn't you answer the Chief Justice by saying that the ques-

tion cannot arise except as an abstract proposition, because this is not one of the three actions under the statute?"

At any rate, I don't know whether that answer would [fol. 3326] have been adequate. Probably the Chief Justice might have said, "While we are at it, we might as well decide it," and so proceed to decide it. They wrote a very extensive opinion, the first one in the United States, in which they held that a state can be guilty of a violation of the antitrust law, either directly or by statute, by authorizing people to do that. And that is the source of the decision that they made the other day, the beginning of it.

Now, I am calling attention to these facts to point to this proposition, that I am not interested in the problem as to whether these men were happy or unhappy, as to whether they were satisfied or dissatisfied, in talking about the L-O station, whether they entered into it knowing fully in advance what to expect or not. All I am interested in is to determine, in addition to the other conditions that you have a right to establish as to them, whether your agreement with them—let's not say "imposition". I was going to say "imposition," but I caught myself—whether your agreement with them, whereby you control the goods that were to be sold and excluded others, and penalized them when they dealt with others, after giving them due warning, whether that, regardless of its voluntary character, regardless of the fact that it is beneficial to them and beneficial to the company, and that possibly a ruling that would invalidate it would result in harm to them and the company and [fol. 3327] to the public, I am interested in only one thing. Is that legal under the antitrust law? And that is all the issue there is as to that, and as to all the others, except to say that as to the others it is a question of fact as to whether there was such a result.

In this case the facts are admitted. The only question is: Is it illegal under the antitrust law?

Mr. Paradise: Your Honor, I think that that is helpful because it permits us to put this matter in *in* its proper perspective.

The Court: This is the only method I know of clarifying my own thoughts, and sometimes young men become upset by a pointed question, but this is not your first case, and I know you did not prepare a speech and if I broke into the

continuity of the speech it would bother you. Well, go back to your original notes and start where you left off.

Mr. Paradise: I think this talk is helpful.

The Court: That is why I like argument. I say I can argue with the man that writes the brief, I can't argue with the brief. The brief does not answer.

Mr. Paradise: This comes at a particularly appropriate place, this discussion, your Honor, because my purpose in showing that the man knows about this before he goes in was not to prove that this was beneficial to Richfield, or beneficial to the man, or beneficial to the public. I appre- [fol. 3328] ciate those factors have no bearing or relevance in an antitrust case, and that is why I objected to a good part of the government's contention over such hardship cases, that they were not relevant to the problem we were discussing. But this is important, your Honor, the fact that the man knows in advance. That is important for an entirely different reason.

Your Honor mentioned that we are discussing and considering the nature of the relationship. Now, some of the Social Security tax cases, in deciding whether a person is an employee or not an employee for purposes of Social Security taxes, have differentiated between a power to control, which was exercised as a matter of economic compulsion afterwards, and a right of control which is understood in advance, before the parties enter into the relationship, and to that extent I think it is pertinent in considering this relationship.

Now, the Sherman Act, as your Honor has well mentioned, is for the purpose of protecting trade and commerce. If there is no——

The Court: The difficulty—I am quite familiar with those cases. I have written quite a number of opinions. In fact, one of the longest opinions I wrote relates to the Federal Employers Liability Act, as to who are and are not employees. That is Hole v. Southern Pacific, and I wrote that in San Francisco, and I analyzed practically every case that [fol. 3329] had arisen, both state and federal, to arrive at a conclusion that a young woman who was a clerk in a claims department, where she performed function No. 3 of a process whereby a claim for loss was adjusted was not engaged in interstate commerce.

The difficulty with taking statutes that are not made for the benefit of persons, and trying to apply them elsewhere lies in the fact that while they both express a desire to achieve social benefit, in the one case the chief aim is the employee, and in the other the chief aim is the public. So that when we are dealing with the Employers Liability Act, we can go very far in holding who is an employee.

In studying that case, for instance, I found out that men who were employed, who never got on a railroad, but who were employed to clean a railroad shed where railroad trains were placed when they came to rest, and where the men had nothing else to do with transportation, were held to be interstate commerce. Also, in the Wage and Hour Act cases, we have the Kirchbaum, and the other cases, where men employed in elevators, in a loft building, where tailors manufactured garments to go in interstate commerce were held to be in interstate commerce.

I was asked some years ago to stretch a point and hold that waitresses in a cafeteria conducted by an independent contractor for the Republic Steel plant at Torrance, merely [fol. 3330] because they were housed in the building and because workmen who work on steel had to be fed, were engaged in interstate commerce. I refused to go to that extent.

So while it is at times helpful to consider control in determining whether a man is or is not an employee, I think when you are dealing with the antitrust law you must bear in mind that the object is this, to stop practices, no matter by whom indulged in or how arrived at, no matter how voluntary their action or how beneficial they were to the people, and that is why we have to confine ourselves to a great extent to the field, except in determining the relationship, where you have to go back to the usual categories in law in determining what relationship does or does not exist.

All right. I will not interrupt you further.

Mr. Paradise: We start this matter of determining the relationship with the initial proposition that an employer-employee relationship—that restraints imposed by the employer on the employee can have no significance as to a possible violation of either the Sherman or the Clayton Act. That, certainly, cannot be disputed.

It is our position, as your Honor knows, after having

examined our brief, and I do not propose to reargue the matters in the brief, but merely to stress some of the particular highlights—it is our position that that is illustrative of a type of reason—put it this way: there is nothing [fol. 3331] in the antitrust laws, either the Sherman Act or the Clayton Act that says that a restraint imposed by an employer on an employee is exempt from the operation of either Act.

The courts have recognized that, as your Honor did in the Standard Oil case, by a recognition of what is the underlying purpose of the Act, and that is to protect trade. The trade performed in Bullock's department store, or in the illustration your Honor gave in the Standard Oil case in a Sears, Roebuck store by an employee of Sears, Roebuck, who is the employer, is Sears' business. It isn't the business of the employee. It isn't a market. And any restraints that Sears, Roebuck imposed upon that man and what goods he could or could not handle in that store would not affect competition, would not affect Sears' competitors, much as Sears' competitors would like to have sold their products through Sears' stores, and through the use of Sears' employees.

We start with that proposition. I think that is basic. A similar proposition is the agency proposition, and the cases have recognized that where there is a relationship of principal and agent, that the business is not that of the agent, it is that of the principal, and that, therefore, any restraints that the principal imposes upon the agent are not restraints on trade and not restraints on competitors, there is no market involved, and, therefore, no possible violation of [fol. 3332] the antitrust laws.

Now, those are not the two sole exceptions to the antitrust laws. Those are merely illustrative of the types of relationship which are held exempt by reason of the recognition of the fact that there is no trade involved.

This is not a market, as Mr. Dixon says. Mr. Dixon has classified Richfield's entire business, in the aggregate of $45,000,000 a year, as a market.

Well, the market here is the market Richfield is competing for against its competitors, and that is the independent service station dealers. These people are not a market, the

L-O operators. These men are not our customers. We select them as people to operate these stations. True, title passes, and that is discussed in this brief, but this is not a market as between Richfield and the operator. This is Richfield's proposition to the public through its own stations. This is the outlet Mr. King talked about. This is what Richfield has to do in order to remain in business to sell its products.

Now, therefore, these matters of the employer-employee relationship and the agency relationship are merely illustrative of the type of a relationship which is cognizable at all under either the Sherman Act or the Clayton Act. Other relationships are pointed out in our brief. They include partnerships, they include joint ventures, and they include [fol. 3333] such things and include matters where there is no principal and agency relationship or employment relationship, but where, nevertheless, there is such an intimate relationship,—and those words "intimate relationship" we didn't coin them, your Honor, that is Mr. Justice Douglas' language, where there is an "intimate relationship," and I am speaking of the Masonite case, an intimate relationship of trust and fidelity resulting from a number of factors as a result of which the parties do not occupy the relationship of mere seller and buyer.

[fol. 3334] The Court: He was dealing with more of a del credere relationship there than anything else. He wasn't laying down rules for future conduct. He was merely analyzing the conditions that warranted them.

Mr. Paradise: I don't say the facts in that case are apposite to this case, but I was distinguishing between restraints imposed by the Masonite Company upon the sales organization of its competitors, except its own sales organization, and that is the language he used.

The Court: And he used the "del credere" phrase.

Mr. Paradise: That is right, because under the General Electric doctrine if you have a true relationship of principal and agent, there is no violation of the antitrust laws, even though—and I think this is very critical—even though the agent is a del credere agent. That merely means this, as we all know, that the del credere agent assumes all the risk of doing business. If he sells to an account of his

own selection, and that account goes broke, that is the risk of loss of the del credere agent, and not the principal, and where there is a del credere agent, even though that man assumes the risk of doing business, that relationship is beyond the scope of the antitrust laws.

The Court: But he is simply a factor in the property that is turned over to him. It still remains the property of the principal, and he is merely responsible for loss.

[fol. 3335] Mr. Paradise: Well, I don't think——

The Court: There is no passage of title. If you are going to talk about "del credere" let us analyze some of the other conditions of a del credere agent. That is all it is, this del credere agency. It is merely a factor who guarantees losses, and in that respect differs from an ordinary factor.

Mr. Paradise: He is the factor who has the risk of doing business, and the only difference between him and an ordinary purchaser is the retention of title. I don't think the antitrust laws are concerned with such a technical difference, legal concept, of whether title is retained or not retained. The antitrust laws are concerned with broad principles of restraints of trade, and, as our brief points out, this matter of what is and is not a restraint goes far beyond the illustration of employer-employee and principal and agent. It has been extended to these various other relationships, where there is an intimate relationship of trust, and fidelity. In the Appalachian Coals case the Supreme Court said:

> ". . . Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. 'The legality of an agreement or regulation cannot be determined by so simple a test, as whether [fol. 3336] it restrains competition. Every agreement concerning trade, every regulation of trade, restrains.' . . . The familiar illustrations of partnerships and enterprises fairly integrated in the interest of the promotion of commerce, at once occur."

Partnerships, or any restraints imposed by one partner on another, those are not restraints under the antitrust

laws. There is a recognition that that is no market, that there is anything that can affect competitors, and for the reason as this department store illustration we pointed out in our opening statement at the beginning of this case.

The government's contention, if carried to its logical extreme, is this, that, take Bullock's department store, with its own salaried employees, competitors could go to a man like the competitor witnesses here, Quaker State and Pennzoil, and raise that appeal, just as the Robinson department store could go to this man and say, "Look. You can buy Robinson's merchandise at cheaper prices and sell it over Bullock's counter, and make more money than you do," but Bullock's prevented him from doing it. They are affecting competition in the way that the antitrust laws are not designed to restrain competition. And we say, "Look at the relationship between Richfield and the L-O operators," and that is all that is involved in this case.

[fol. 3337] Now, from all of the factors which we have mentioned, which are pertinent to this relationship, the purpose, Richfield's investment, what these men are told, the reason for having these stations, all of those factors were discussed and are discussed and considered in large part in the publishing company cases.

I refer to the discussion in those cases on page 28 to page 31 of our brief, and I will not repeat it, other than to point to the specific language, on page 29, that this was—that the court recognized that this was not an effect on competition, this was a part of the complainant's business, the complainant in that case being Curtis v. The Federal Trade Commission.

On page 31 is a very appropriate quotation that Curtis, "was not throttling or indeed dealing with the ordinary channels of commerce, but was enlarging the sphere of commerce by enlisting in its service the selling power of" these particular "schoolboys" in this case "who, but for this organization, would not only not have taken part in present commerce, but who would have missed the commercial training the Curtis Company alone gave. . . ."

Just as Mr. King has pointed out, facilities have been furnished to these men, having a capital valuation of from $25,000 to $35,000, at far less than the fair rental value, and that they never could have gone into business on their own

[fol. 3338] book value. The court said in the Curtis Publishing Company case that this distributing agency, the agency part of it, its purpose, and the relationship was not that of a buyer, "who thereby acquires title for his own individual purposes."

The court said they acquired title for a specialized purpose, and that was to engage in trade for the benefit of the Curtis Company, and not for the benefit of its competitors.

Now, these matters, as I say, are illustrative of the broader purpose.

The Court: In those cases, what they did was to make them exclusive agents of the Saturday Evening Post, and what was the other publication—the Ladies' Home Journal?

Mr. Dixon: The Pictorial Review.

The Court:—the Pictorial Review, and that is all it was. They did not put them in charge of a business. He was not paying them any rent. He was receiving a commission on the sales, and he had a right to return to them the unsold copies. The new method in that is just to tear off the front page, and they no longer send back the entire copies because the rest is thrown away, and all the agent does now is to tear off the front page to show it has not been sold, and he turns it in and gets credit for it.

As I say, there is a lot of difference between that situation [fol. 3339] and the situation here.

Mr. Paradise: Well, let us take a look at that situation. There is here in the Richfield case a situation similar to the situation in the publishing company cases. We have a comparable factor to the one your Honor just mentioned, that matter of the return of unused merchandise. We give this man, or, I won't say we give it to him. He buys it. He buys his opening inventory of petroleum products, gasoline and lubricating oil. If it is a new station, he just buys it from Richfield. If it is a station already in operation, he buys it from the out going operator. We won't let him buy MacMillan or Quaker State, or other competitive products that he has there, because he is to handle Richfield oil, and he buys that and the approved TBA and the approved small tools, the things that are appropriate to a service station, and when he goes out Richfield assures him it will provide for the sale of that either to the incoming operator, who

will take over the same stuff, or if there is no incoming operator, then Richfield takes it back itself, as Mr. King testified. That is a complete parallel to the publishing company cases.

Your Honor mentioned that in the publishing company case he was not furnished a facility. Well, the non-furnishing of a facility gave the publishing company cases a far less ground for controlling him than Richfield has in this situation.

[fol. 3340] Here Richfield has its investment, and while I have forgotten the number of the exhibit that shows it, I think it is safe to say Richfield has an investment on its books in those costs of something like $20,000,000 in service station sites, and service station buildings, which have been furnished to these men at less than their rental value.

The Court: But your argument, however, overlooks the fact that he still remains a distinct entity, as distinct from yours, while the others are not. All you have to do is to go to the corporation cases, the corporation agent cases, beginning with the subsidiary cases, and we have authority, not only in California, but from the Supreme Court of the United States, which tells us that even complete ownership of stock of a corporation by another does not sufficiently destroy the individuality of the subsidiary so as to make them one. And in the tax field the courts have insisted that one who adopts that form of doing business is responsible. I remember I handled a case that was affirmed by the Court of Appeals the other day, and it was one of these one-man corporations, and my very good friend, and your friend, Frank Doherty, was arguing before me that all this man did was to take money from one pocket and put it in another, speaking as to both corporations. My answer was that that may be true, but he chose to have these two distinct individualities, and for tax purposes, he having chosen to [fol. 3341] do business on that basis, I cannot destroy them. And in the case of national corporations, the Supreme Court, beginning with the Peterson case, Peterson v. Chicago Railway, in 1907, following in the case of Philadelphia Railway Company v. McKibbin, 243 U. S. 264, and Rosenberg Bros. case, in 260 U. S. 516, and the International Harvester case, and the California cases, beginning with

the case of Davenport v. Superior Court down through to the last one, The Thew Shovel Co. v. Superior Court, 35 Cal. App. 2d, 183, have always held that where there are two distinct entities that exist, that the mere fact that one controls the other does not matter.

[fol. 3342] By the same token, they have held that where a representative of the company is a salesman who takes orders which are filled in the east, that they are doing business in the state. That happened in the case of West Publishing Co., where they tried to avoid service here by claiming that these men were not agents of the company. The court held them agents of the company.

So that we have a distinct principle which runs through the various branches of the law which indicates to us criteria by which we must determine what the particular relationship is.

Mr. Paradise: I agree with that most heartily, your Honor. I agree that there are two entities herein involved, Richfield and the L-O operator. I do feel, however, that those cases are not pertinent to this problem, for this reason—perhaps it could best be approached in this fashion: I think your Honor may be troubled by the fact that as to the problem as to whether Richfield has made these men independent, and I think maybe Mr. Dixon was getting to that by his own argument. I think there is the point of complete difference when we compare the facts in this case with the facts in the Standard case. I conceive and concede also, as I did in the opening argument, that if Richfield leased this property to these men for, say—take an L-O operator—Richfield leased this property to an L-O operator for the period of a year or two years or five years [fol. 3343] and gets a fair rental for it, and does not say we are leasing it to you for this limited purpose, and does not supervise him and does not explain what he is to do, that then Richfield is making the man independent. He becomes an independent merchant. Then he is established in business, as are these independent dealers we have in the 337. Then if Richfield should try to exercise its right of economic compulsion, then that might be a restraint of trade.

But that is not involved in this case, and that is the chief and most vital difference between that and the Standard oil case.

We have decided all this in advance. The man knows this before he goes in. We have decided this before he goes in. It is our business, it is Richfield's business. That, I think, is emphasized in some cases that I mentioned before the recess that I want to call to your Honor's attention.

The Court: Another thing, notwithstanding that you do not put it in an instrument in writing, you are maintaining the fiction of leasehold independence by not putting any of these things into the lease.

Mr. Paradise: I would not say it is a fiction, your Honor. These things are the most important part of the relationship.

The Court: But they are not there. They are not in the [fol. 3344] lease. In other words, all these tie-ins, as you call them, all these compulsions you put on him, you see, except the very broad one of terminating on 24-hours the lease, are oral agreements made at the time and understood as a condition, which, of course, legally would not be binding because they are merged into the agreement under the law of California.

Mr. Paradise: I do not think I would agree with that, your Honor, because we are not dealing with the parol evidence rule here. If we were, the Government would not show anything beyond the writing.

The Court: No. In all these cases you can go behind the actual agreement and see what the actual deal is. We are not talking about that. But these conditions that you make as a part of the contract are not spelled out there. I am not practicing state law. I am not telling you you have a good contract. I kind of sympathized with Mr. DeLonge and I tried to give him a little comfort by telling him perhaps he had incompetent lawyers in his presentation of the problems for a final determination by the court.

But I am not giving anybody any advice or finding any flaws with your contract. I am pointing to the fact that you have got a double set of rules, one written and one oral, and you come before the court and say: Look, these are merged into one. Before this man actually goes in he knows what we are going to do to him, whether it is written or not. [fol. 3345] You do not say in the contract that he has got to take only Richfield products. But he knows that if he does not do that we will put him out. So you are trying to

take two contracts and put them together, and say that because they are merged they create a hybrid that requires me to disregard the fact that your primary contract is a contract of lease which leases premises under certain conditions for a rental and has in all other respects the same characteristic as any other lease so far as responsibility, whether judged by general common law or law of the State of California. It is a leasehold in all respects. It has a term terminable, it has a fixed rental to be paid, it transfers possession, it makes him individually responsible, it does not guarantee him his pay.

I am talking over facts, thinking of all the elements. It makes him responsible for any employees, it makes him responsible for injuries that happen to anyone who comes into the station, it makes him responsible for assault and battery to any persons who come to deal with him. Under the case I myself wrote on the Court of Appeals it makes him responsible to state and federal governments for withholding taxes of the employees. He has to take out his own employer's liability. He is not on your payroll as an employee. You are not responsible for social security, state or federal, and yet you say all these should be disregarded because, by a sideline you have imposed conditions that [fol. 3346] kind of minimize the power that he has.

Mr. Paradise: We are getting at the nub of it, your Honor.

The Court: Of course we are, of course we are.

Mr. Paradise: There are some cases that we want to point out, your Honor, that bear on that precise and very thing, cases which, while they are not antitrust cases, do discuss the nature of this relationship. And these, I want to tell your Honor in advance are all service station cases. These are particularly appropriate on their facts.

First, I want to cite your Honor a group of cases. Most of these are state court cases. One is a federal case, but they are so opposite on the nature of this relationship that they become particularly important at this time.

The first is a group of cases that considers the problem of whether the operator in a situation comparable to an L-O station—this does not involve Richfield—whether the operator of that sort of a station and his helper are em-

ployees of the oil company in Richfield's position for the purpose of the Workmen's Compensation Act.

Second is a group of cases whether the oil company maintains sufficient control over the operators of stations comparable to the L-O stations and the helpers of those operators subject the oil company to liability for chain store [fol. 3347] taxes in states having such legislation.

And third, in a case—a case involving Richfield in one of its own L-O stations, as to whether Richfield is liable for the torts of that operator.

I say that those three groups of cases are particularly pertinent to this question of relationship for three reasons.

The Court: Did they hold in that case that you were or you were not?

Mr. Paradise: They held we were liable as a joint operator of the station. That is the case of *Hayes v. Richfield Oil Corp.*, 103 A. C. A. 23, decided two months ago in California, and involves one of the Richfield L-O stations.

Liability was determined in that case on two grounds: One, landlord and tenant, because Richfield leased it out for a so-called public purpose. This is a decision by the District Court of Appeal.

The Court: Is there a petition for hearing pending?

Mr. Paradise: I beg pardon?

The Court: Is there a petition for hearing pending?

Mr. Paradise: No. It has been denied.

The first alternate ground for the liability was Richfield was jointly in there operating the station.

These three groups of cases are significant in this respect: They demonstrate, first, that the courts in situations comparable to the Richfield L-O situation have held [fol. 3348] that, notwithstanding the existence of a lease or the landlord and tenant relationship, that the true relationship more closely resembles that of master and servant.

This, I think, is critical to this entire problem. On the basis of such holding in each instance was the recognition of the control exercised by the lessor oil company over and above its normal rights accruing from a simple landlord and tenant relationship.

The Court: You must, however, bear this in mind when

it comes to a piece of social legislation like that of the United States of America we are not bound to follow interpretation of state statutes as to the relationship.

Mr. Paradise: Oh, I understand that.

The Court: I have a case now where one of these family partnerships was before me and I held that, despite the fact that this partnership might be recognized by the law of California, where the man took his own daughter, 12 years of age, and his son, 14, into partnership in the flush years when he was making a lot of profits on floor contracts —he had a termination provision, too, a 30-day provision. He could kick the partners out on the 30-day provision. I held that may be good for the state, but the Government of the United States would not recognize that for tax purposes.

So you see, you must bear in mind many times, for the purpose of finding somebody responsible for a tort committed against a third person, a court may hold that a cer- [fol. 3349] tain relationship might be recognized and the same court would not do the same thing when it is dealing with an entirely different relationship. That is very well recognized in law, just as, for instance, under the law of California certain mortgages are not recognized. But as between the parties the court will enforce the contract.

The other day I had a motion picture case. I had to decide for the first time in the United States whether you could foreclose a chattel mortgage to the copyright of a motion picture in the federal court, and I held that you could. In studying the matter I came to the conclusion— it was argued that the State of California does not recognize mortgages on intangibles like a copyright. But I took cognizance of that, but I also took cognizance of the fact that as between the parties themselves the right would be enforced.

The same way in the law of partnership. For instance, we will hold people responsible as partners, although between themselves they are not partners. We will hold people responsible as agents who are not agents.

When I was in the State courts I sat on the Court of Appeals temporarily, pro tem, and I wrote an opinion in Bee v. McClachan, involving an old station here, involved the question whether a woman who was sent out to solicit ad-

[fol. 3350] vertising was duly authorized by an agent. It was quite evident that the man who had authorized her to solicit and promised her compensation was not authorized for that purpose. But we held—and Judge Stephens agreed with me—that so far as she was concerned, she went there seeking employment. They had advertised for agents. She was directed to the man's office. He told her to go out and get it, and it was too late afterwards, when they got the benefit of the contract, to repudiate it on the ground that he had no authority.

Throughout all the law that is the beauty of the Anglo-American system. It is so flexible. We switch from one to the other. We say you are an agent for this purpose and you are not an agent for the other purpose. You are a partner for one purpose and not for the other purpose. We say the State of California may call this a partnership. Uncle Sam won't recognize you for that purpose. So we are constantly realistic. We are not dogmatic.

Mr. Paradise: That is the realistic thing about this, that there is a transfer of title here, that Mr. Dixon pointed out in his opening statement. These men are not customers. Let us be realistic about this. We are not trying to sell them any gasoline. They came in to operate our station. They may be purchasers legally, but they are not our customers, and this is not a market. And that is our case.

[fol. 3351] The Court: All it amounts to is this, that you are giving a property at a bargain price because it is beneficial for you. Suppose you gave them free rent, it would not change any relationship of landlord and tenant merely because you gave them free rent. I can't brush it aside. The spot is there and it won't — out. Because, despite all the rationalization and argument, the fact is that these men are bound by a lease which has all the conditions and considerations imposed, all the obligations of a leasehold.

Mr. Paradise: That is why I thought your Honor would be particularly interested in these three groups of cases, because in each case——

The Court: All right. Have you got them written up?

Mr. Paradise: Yes.

The Court: I mean have you got a list of them?

Mr. Paradise: Yes, your Honor.

The Court: Suppose you hand them to the reporter and

do not take the time to read them to me. Hand them to the reporter to transcribe and put in.

Mr. Paradise: All right. I think particularly important and would like to point out to the court not only from the quotations herein contained, because in each case—I would like to state, first, the scope of these three groups of cases. I won't repeat the facts.

[fol. 3352] Mr. Paradise: In each case I want to point out there was far less control by the oil company of the operator. In each of these cases I want to emphasize these points. Each case involved a situation where the oil company was the supplier and there was a lease, a landlord and tenant relationship, and in most of the cases the lease was for a year and not for 24 hours. There was a transfer of title, and in each case the oil company was attempting to escape responsibility on the ground that this man was independent, he was an independent contractor for liability purposes. They had no control under the chain store tax, under the workmen's compensation acts. He was not their employee. And in none of the cases was the oil company successful. In every case it was held that even though there was a written lease between the parties, that that is not the dominating factor of this relationship.

In one case the question came up, one of these cases—I have forgotten which one it is, offhand—in one case the question came up, the oil company tried to escape chain store tax liability on the grounds that its relationship was just landlord and tenant. It said we have just a simple lease here, the man pays rent. And the court pointed out the oil company is not in the real estate business. The dominant characteristic of this situation, the court pointed out, is that the oil company maintains its property and puts [fol. 3353] this man in here for the purpose of sale of its products.

As your Honor pointed out in the Owl Drug case, the reason that was held to be a lease was based on two primary facts. One was that it had a specific and definite term, a three-year term, as your Honor pointed out. And second, that the rental that was received by the Schlesinger Company was the primary consideration.

In this case, this chain store tax case, the court pointed out that the oil company attempted to escape liability for

chain store taxes. It said that this rental is not the primary consideration. The primary consideration is the fact that the oil company maintains this property and holds it for the purpose of the sale of its products.

Your Honor does not believe that the primary consideration that Richfield has in maintaining these stations is to collect one cent a gallon rent for this property, in view of this $20,000,000 investment and the fact Richfield pays far more rent than that to the property owner.

The primary consideration is the sale of its products in every one of these cases I point out to the court. The landlord-tenant relationship was subjugated. It was held to be paper work only and that the real economic relationship, in the words of your Honor in the Owl Drug case, the realistics of the situation, by Mr. Douglas in the Masonite case, this is a relationship, an intimate relationship. This [fol. 3354] is a part of Richfield's own sales organization.

Now, let us go to the other side of the ledger. Your Honor has pointed to the fact there is no payment of wages, no payment of social security taxes, no workmen's compensation. That is the Government's argument, obviously. They have talked about investment and they have talked about no wages and no social security and no workmen's compensation.

Let us assume that that be true, which these cases prove that it is not. Under these cases there can be no doubt in my mind, in my own personal belief, of the existence of those obligations for payroll taxes, social security taxes, workmen's compensation coverage and the like.

But supposing Richfield did pay those. Is that the Government's point? The Government's point is this: That these men, they say, are independent businessmen.

And how do they prove it? They say we do not pay the man a minimum wage. But this is not a minimum wage case. They say we are not paying social security tax, but this court is not being asked to impose social security taxes on the Richfield Company. If that case comes before your Honor, you will decide whether these men are employees under the Social Security Tax Act. If a workmen's compensation case came before your Honor—of course, it won't, because it is a California problem—you would decide whether these men are employees under workmen's com-

[fol. 3355] pensation. If a tort case came before your Honor, as it did in the case of Richfield v. Hayes, your Honor would be justified in following the law of California—that despite the fact there is a landlord-tenant relationship, despite the fact there is a lease with all these side oral instructions which are conditions on the lease. Your Honor would be perfectly justified in holding, as did the California court, that Richfield is liable for the torts of this man because Richfield is a joint operator of the station.

The Government says we did not declare these men for workmen's compensation purposes, but the Government is not here for the purpose of enforcing the workmen's compensation laws.

The Court: Mr. Dixon has argued it because you cannot segmetize it. They can argue in determining what the characteristics are, following the ordinary norms by which the relationships are established. They are going to say——

Mr. Paradise: Did you want to take a recess?

The Court: Yes, I was going to take that. And then I will order that transcribed into the record right here. It is a good place.

Mr. Paradise: Thank you.

"Defendant's Supplemental Memorandum

"Pursuant to leave of Court granted at the close of trial, defendant sets forth in this Supplemental Memorandum [fol. 3356] authorities not cited in defendant's original memorandum (filed prior to trial), which additional authorities defendant submits are pertinent to the problem of the nature of the relationship between Richfield and the L. O. operators.

I

The cases hereinafter cited involve the nature of the relationship in the light of three different fields of law or frameworks of reference:

1. Whether the operator of an L. O. station and the helpers of such operator are employees of the oil company for purposes of the Workmen's Compensation Acts:

"Continental Oil Co. v. Sirhall, 222 Pac. (2d) 612, (Colo. 1950);

Bieluczyk v. Crown Petroleum Corp., 58 Atl. (2d) 380, (Conn. 1948).

2. Whether the oil company maintains sufficient control over the operators of L. O. stations and their helpers to subject the oil company to liability for chain store taxes in states having such legislation:

Maxwell v. Shell Eastern Petroleum Products, Inc., 90 Fed. (2d) 39, (C. C. A. 4, 1937);
Standard Oil Co. (Indiana) v. State Board of Equalization, 99 Pac. (2d) 229 (Mont, 1940);
Midwestern Petroleum Corp. v. State Board of [fol. 3357] Tax Commissioners, 187 N. E. 882 (Ind. 1933).

3. Whether the oil company is liable to a third party for torts of the L. O. operator on a theory or basis of liability different from that of mere landlord:

Hayes v. Richfield Oil Corporation, 103 A. C. A. 23, (Cal. 1951).

Before proceeding to a digest of the facts and pertinent holdings of the above cases, defendant respectfully suggests that they are of particular importance in the present inquiry in the following respects:

(a) They demonstrate that the courts in situations similar to the L. O. relationship have held that, notwithstanding the existence of a lease or a landlord-tenant relationship, the true relationship more closely resembles that of master and servant. The basis of such holding in each instance was the recognition of the control exercised by the lessor oil company over and beyond rights accruing from a simple landlord and tenant relationship.

It is significant to note that in most of the cases cited there appeared to be less control and less bargained-for right of control than Richfield has over its L. O. operators. In most of the cases, the operator had a lease of [fol. 3358] considerably longer duration than the 24-hour termination clause provided for in Richfield's

form 542 which has been in use in all L. O. stations since 1941, (see Stipulation of Facts, defendant's Exhibit A). In most of the cases, there did not exist the factor here present whereby the L. O. operator is told before he goes into Richfield's station that he will be required to conform to Richfield's instructions and directions on a multitude of matters concerning operation, not limited to the simple requirement of exclusive dealing in Richfield's petroleum products and approved T. B. A.

(b) The cases demonstrate that the courts in situations similar to the L. O. relationship have held that, in other fields of law, the oil company does have certain legal responsibilities flowing from the relationship between the oil company and the L. O. operator. (As hereinafter discussed in Part II of this Supplemental Memorandum, the existence or non-existence of such responsibilities does not have any relevance to the question of the application to the L. O. operator situation of Sec. 1 of the Sherman Act or Sec. 3 of the Clayton Act.)

It is significant to note here that in many of the cases above cited the oil company asserted unsuccessfully that the person in the position of the L. O. operator was not 'controlled' or was an 'independent contractor' on the grounds that he was a lessee, that he paid a specified [fol. 3359] rental for the station, that he paid the salaries and wages of his employees and helpers, that he assumed responsibility for and agreed to indemnify the oil company for claims due to his negligence or other grounds.

(c) The cases demonstrate also that the courts, in determining in other fields of law the nature of a relationship comparable to the Richfield-L. O. operator relationship, have not been circumscribed by the form of a transaction but have sought out and have considered decisive the economic realities of the situation.

This approach is consistent with that of Mr. Justice Douglas in the Masonite case (quoted on page 44 of

defendant's original memorandum), and of Judge Yankwich in the Owl Drug case:

> 'In the complex civilization in which we live, in determining the relationships created by written instruments we must bear in mind their essentials, in the light of modern requirements.'

A

Analysis of Workmen's Compensation

Cases Above Cited

1. Continental Oil Co. v. Sirhall, 222 Pac. (2d) 612, (Colorado, 1950.)

[fol. 3360] Here the oil company leased its service station to one Miller for a period of one year at an agreed monthly rental. The claimant for Workmen's Compensation benefits was an employee of Miller who was injured during his employment at the service station; and he asserted the liability of Continental under the provision of the Colorado Workmen's Compensation Act which provided that: 'any * * * corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor or sub-contractor, shall * * * be construed to be * * * an employer * * *.'

The Court said (pp. 612-613):

> 'Independent of the statute, claimant beyond question was an employee of Miller, and not of the company, * * *
>
> 'We have repeatedly held that this section is valid and that thereby an obligation may, in proper case, be imposed against an owner where the common-law relationship of employer and employee does not exist, in that one may be an employee by virtue of the statute, for the purpose of workmen's compensation, when in fact he is not an employee by common-law definition.'

The Court took pains to point out that the fact that Continental was the lessor to Miller did 'not of itself create [fol. 3361] liability.' The Court held that to make a lessor

liable under the Colorado act, 'there must be facts showing that he is operating, engaged in, or conducting his business by leasing; not merely that he is a lessor.' (p. 613)

The Court noted the oil company's argument that the relationship was solely that of lessor-lessee (p. 613):

> "Miller was ostensibly merely a lessee of the company. In form the relationship was, as alleged, a pure lessor-lessee relationship. There was a specified monthly rental based on the business done at that station during the preceding year, with no share of loss or profit by lessor. There was no right of control of the business or operation reserved by the lessor. Lessee's only formal obligation was to pay the specified rental and keep the property operating and in good condition. He purchased his products from the company for cash. It is urged that the situation is exactly that of any owner of real estate who leases it to another.'

Nevertheless, the court held that under the circumstances Continental 'was operating its business by leasing part of the work of its business to a lessee.' (p. 613)

Particular attention should be given to the distinction by the court of the case of Bukowich v. Ford Motor Co., 59 Pac. (2) 470, (Colorado) wherein the Colorado court had held that the employee of a dealer in Ford Motor Company's products under a written sales contract was [fol. 3362] not to be considered an employee of the Ford Motor Company under the Colorado Workmen's Compensation Act.

(An examination of the decision in the Bukowich case will disclose that the dealer in Ford products occupied a position comparable to the so-called '337 dealer' in the Richfield case.)

The Colorado court in the Continental case distinguished the Bukowich case on the following grounds (p. 614):

> "In that case no question of operating a business by leasing was involved. There, Ford Motor Company did not own either the building or the equipment. Both were held by the local dealer either by virtue of ownership or of lease from some other person without power

of termination by the company; there the sale of the Ford Motor Company products is not shown to have been the dominant part of the dealer's business. * * * Had that company (Ford Motor Company) owned and leased to the dealer a building equipped and adapted principally to the display, sale and service of Ford Motor Company products, by short term lease, and had the dealer's business been restricted almost exclusively to the sale of such products, then the situation might have been analogous to that here presented.'

2. Bieluczyk v. Crown Petroleum Corp., 58 Alt. (2d) [fol. 3363] 380, (Conn. 1948).

Here also the claimant for Workmen's Compensation insurance was a helper in a gasoline station owned by Crown Petroleum Corporation and operated by a Mr. Toomajian under a so-called 'dealer's agreement'. The Court stated that the primary question is whether or not Toomajian was an employee of Crown Petroleum Corporation.

(It does not appear that the Connecticut Workmen's Compensation Act contained any provision comparable to that involved in the Continental Oil case, supra.)

The Court stated the terms of Toomajian's occupancy of the station as follows (p. 382):

'On that day it entered into a written agreement with Toomajian whereby he was to maintain, occupy and use the premises, deal in petroleum products supplied solely by the defendant, diligently carry on the business of the station and comply with all requirements of the defendant, provide necessary assistants at his own expense and responsibility, pay as rent a sum equal to one cent per gallon on all gasoline delivered plus a flat monthly charge of ten dollars for each lubritorium on the premises, and pay all expenses incident to the operation of the station, including heat, water, light, taxes and license privileges. By its express terms the agreement was to remain in force [fol. 3364] until terminated by either party upon five days' written notice, but the defendant reserved the

> right to cancel the contract forthwith if Toomajian did not fully perform his obligations thereunder.'

The Court discussed the various aspects of control by Crown Petroleum Corporation over the operations of its stations and held that, for the purposes of the Connecticut Workmens Compensation Law, Toomajian was an employee of the oil company.

Of particular significance is the Court's discussion of the oil company's contention that its contract with Toomajian was a lease which constituted Toomajian a lessee in contra-distinction to an employee. In rejecting such contention the Court said (p. 384):

> 'The occupancy of the premises by Toomajian with the defendant's permission, for which he paid, falls within the general definition of a landlord and tenant relationship, 51 C. J. S., Landlord & Tenants, Sec. 1; but it is clear upon the facts found that the contract was really one of agency and that the use of the premises was incidental, a permissive use rather than one which gave an exclusive interest in the land. See Guiel v. Barnes, 100 Conn. 737, 742, 125 A. 91; 1 Underhill, Landlord & Tenant, Secs. 210, 211, 213.'

[fol. 3365] B

Analysis of Chain Store Tax Cases Above Cited

1. Maxwell v. Shell Eastern Petroleum Products, Inc., 90 Fed. (2d) 39, (C.C.A. 4, 1937.)

Here the oil company was held subject to the chain store tax of North Carolina which imposed the tax on 'every person * * * engaged in the business of operating or maintaining in this State, under the same general management, supervision or ownership, two or more automotive service stations, or engaged in the business of retail selling and/or delivering of any tires, * * * or motor fuels and/or lubricants, or any of such commodities, or who controls by lease either a lessor or lessee, or by contract, the manner in which any such automotive service station is operated, or the kind or kinds, character or brand or brands of merchandise which are sold therein * * *.'

The various service stations involved were owned or leased by Shell and thereafter sublet to operators under written instruments which included a lease and a written sales contract. In each instance the lease provided for a term of not less than one year, excepting where the oil company's basic lease was for a shorter period. Shell had no right to cancel the lease except for breach by the lessee. The lease provided for a fixed monthly rental 'not exceeding in amount the fair rental value of the premises' but there were various instances of voluntary reduc-
[fol. 3366] tion of rent by the lessor. Some of the leases provided for gallonage rental with minimum amounts in dollars.

The lessee also signed a sales contract terminable by the dealer at the end of each year, but Shell reserved the right to terminate such contract at any time upon ten days' notice. The sales contract originally provided that the operator buy his entire requirements of petroleum products from Shell. The contracts were modified by amendments specifying that the operator purchase specified quantities of gasoline, which quantities represented approximately fifty per cent of the dealer's yearly requirements of the products.

Shell contended it did not control the operators of its stations. The Court found that none of the operators at any of Shell's stations sold any gasoline, lubricating oils or greases other than Shell's.

The Court held that Shell, for purposes of the chain store tax statute, did control the operation of the stations through its control over the premises which Shell exercised through its ownership or tenancy.

The Court said, on page 42:

> 'The Shell Company controlled the premises as owner or as tenant of the owner; and rival producers, knowing that it would not be possible for them to obtain permanent possession, would be unwilling to incur the [fol. 3367] expense of a temporary arrangement with the dealer for the sale of their products.'

2. Standard Oil Co. (Indiana) v. State Board of Equalization, 99 Pac. (2d) 229, (Mont. 1940).

This case involved the chain store license tax law of Montana, which defined a store to include any establishment 'owned, operated, maintained or controlled by the same person, firm, corporation, * * * in which goods, wares or merchandise or petroleum products of any kind, are sold, either at retail or wholesale'. The stations here involved were leased fully equipped by Standard Oil Company (Indiana) to operators under leases providing for a term of six months and providing for rental on a gallonage basis. The Court stated that 'The single fact question determinative of this cause is the one of control of the leased stations of the plaintiff'. (p. 231)

The oil company had contended that there was no requirement that the operators buy petroleum products from it and that its only connection with the stations was owning the parcels and leasing them 'to independent persons' who in turn retailed the commodities sold to them by the plaintiff. The Court rejected such contention flatly and held that there was a sufficient control for purposes of chain store taxation. The Court said (p. 231):

'The short term of the leases negatives the idea that the plaintiff was only in the real estate business and was not [fol. 3368] protecting its wholesale petroleum products outlet by arrangements whereby lessees of the retail stations would be forced to buy Standard Oil products.' The Court called attention to the plaintiff's inspection of the stations and the manner in which the business was conducted and the courses of instructions to operators and instructions as to methods. The Court made the following comment on page 233 on Standard's contention that the relationship between Standard and the operator was landlord and tenant:

> 'As we have indicated, the record shows that the primary purpose of the plaintiff in its ownership of the stations and the arrangements under which the stations are leased is to secure the sale of the products of the plaintiff. That fact differentiates the position of the plaintiff and that of the ordinary landlord renting out property for retail store purposes. The ordinary landlord is compensated only by the rental received for the property.'

The foregoing statement is particularly significant when the facts pertaining to the Richfield L. O. stations are compared with the facts involved in the *Owl Drug* case, 12 Fed. Supp. 439.

3. *Midwestern Petroleum Corp. v. State Board of Tax Commissioners*, 187 N. E. 882, (Ind. 1933).

This case involved the chain store tax law of Indiana. [fol. 3369] The oil company contended that it did not sell merchandise at the stations, that the service station dealers bought their petroleum products and owned them and had the right to buy and deal in products purchased from other sources, and that it exercised no control or supervision over the station.

The Court held that the stations were subject to the chain store tax and said (p. 889):

> "III but appellant has reserved the right to cancel any such lease upon written notice a specified number of days in advance; that the only interest of appellant in the station is an outlet for its merchandise. The purpose of the ownership of the stations is the sale of appellant's products. Some of the dealers pay no rent. It is alleged that they are free to buy from other sources, but it is obvious that if they purchase all or a considerable part of their merchandise from any other source, appellant would cancel the lease since appellant is only benefitted by the sale of its products. It is alleged that some of the dealers pay cash rental. To put it another way, some of the dealers look for their compensation to the retail profit of the station, and as compensation receive the entire retail profit, while others are required to pay to appellant part of the retail earnings of the station and retain the balance as their compensation. [fol. 3370] They are in the same situation as employees working on commission, notwithstanding title to the merchandise handled vests in them upon delivery. They are required to pay the wholesale price, but retain the retail price. To say that these stations in their operation are not under the control of appellant would be to ignore the plain fact that the operators must

obey the every dictate of appellant or lose their contract and station.'

C

Analysis of Tort Liability Case

Hayes v. Richfield Oil Corporation, 103 A.C.A., 23 (Cal. 1951).

This case involved a Richfield L. O. station at which the plaintiff was injured when she fell into an open grease pit. The suit was brought against both Richfield and Mr. Scavone, the L. O. operator. The Court held that Richfield was liable for the injury under either of two theories, i. e., (1) as 'joint operator of the station with Scavone', or (2) as lessor who has leased the same for a public service. The Court mentioned the instruction to the jury that Richfield 'retained control over the business of Scavone's Richfield Service' and held that '* * * the jury were warranted by the evidence in finding that appellant was a joint operator with Scavone and therefore liable to respondent.'

[fol. 3371] "II

Some of the cases cited in Part I above are discussed in an article by F. R. Black in 29 Georgetown Law Journal, 439, entitled 'Exclusive Dealer Devices in the Marketing of Petroleum Products.' Mr. Black's article contains the best definition we can find of the attributes of an independent business man. On pages 450 and 451 Mr. Black states that it is 'grotesque' to claim that the operator of a station having most of the attributes of one of Richfield's L. O. stations is 'an independent dealer.' (Defendant would contest most vigorously any contention that the purposes or objectives which Mr. Black ascribes to the creators of the so-called 'Iowa Plan' there discussed have motivated Richfield in the creation or operation of the L. O. stations; and this Court is well aware that there is no evidence in the record from which any of such motives or intentions could be inferred). The defendant does approve, however, Mr. Black's definition (pages 450-451) of an independent business man:

'It is common knowledge that an independent business operator has certain rights and privileges among them being, (a) the right to buy in a competitive market and

deal with several companies, if he *do* desires; (b) the right to select his own fixtures and equipment; (c) to determine his own sales policy; (d) his method of advertising; (e) the manner of display of his products; (f) the good will of his business is his own, transferable at pleasure and for a consideration satisfactory to him; [fol. 3372] and (g) the continuation of his business is not dependent on the will of another.'

The issue in this case in so far as the L. O. stations are concerned is the nature of the relationship between Richfield and the L. O. operators within the framework of whether they constitute on the one hand, independent business men and therefore a legitimate market to Richfield's competitors, or whether, on the other hand, they are not independent business men and the business conducted at the L. O. stations is Richfield's trade and business and it is not a legitimate market for its competitors and is not the subject matter of competition.

This Court's inquiry into the nature of the relationship is concerned solely with the foregoing problem. The issue is not (as suggested by the Plaintiff) whether the L. O. operators are employees or agents of Richfield. Employment or agency relationships have been cited by Defendant merely as illustrations of relationships wherein a restraint imposed upon another party was held not in violation of the Anti-trust laws because of the recognition that there was no legitimate market to competitors involved, and therefore no effect on competition which could violate the Anti-trust Laws. Defendant's original memorandum (pages 17-46) discusses the un-erlying reasons why restraints imposed upon various relationships, including employment, agency, partnership, [fol. 3373] joint venture, and others, are not cognizable under the antitrust laws; i. e. that competition is not affected when there is no legitimate market or subject matter of competition. The language of the antitrust laws does not expressly exempt from their provisions restraints upon either employees or agents; such exemption results from the recognition of the underlying reasons above described. The Government's contention that the L. O. operators are neither employees nor agents is neither conclusive nor even relevant.

The Government's contention appears to be that if the

L. O. operators are proved to be neither agents nor employees, they must be independent contractors, and the Government's ambiguous syllogism is that men who are independent contractors must be classified as independent business men. There is a vital difference between (1) what is an 'independent business man or merchant' in an antitrust framework where the issue concerns the existence or nonexistence of a legitimate market, and (2) what is an independent contractor as differentiated from an agent or employee in other fields of law. The significance of the differentiation between an agent or employee on the one hand and an independent contractor on the other may be important from the standpoint of tort liability, social security taxes, minimum wages or other legal incidents having no relationship whatsoever to the problem of the existence of a legiti-[fol. 3374] mate market within antitrust concepts.

If it is determined under the facts and circumstances here involved that the L. O. operator is not an independent businessman from the standpoint of the concept of the antitrust laws as to competition and the subject matter thereof, there can be no violation of either the Sherman nor the Clayton Acts, notwithstanding that the L. O. operator may be deemed to be an independent contractor when viewed from the standpoint of tort liability, payroll taxes or minimum wages.

It appears to be the position of the Government in this case that if Richfield does not have the responsibilities or liabilities (Workmen's Compensation coverage, social security taxes, tort liability, etc.) attendant upon an employment relationship, then as a penalty for not having such responsibilities, Richfield must be liable under the antitrust laws for requiring the L. O. operators in Richfield's own stations to handle its products exclusively. Richfield submits that such position by the Government contains an absolute *non sequitur*. If it be assumed, arguendo, that Richfield does not have any of such responsibilities or liabilities, such assumption would still be a matter of complete irrelevance to the question of whether Richfield's restrictions upon the L. O. operators violate Sec. 1 of the Sherman Act or Sec. 3 of the Clayton Act.

[fol. 3375] The absence of such responsibilities or liabilities is not, as the Government would suggest, a substitute for or the equivalent of requisite proof by the Government

of the existence of a ligitimate market and of the status of independent business men. Whether or not Richfield has common law or statutory responsibilities in other fields of law resulting from the relationship between it and the L. O. operators is of no concern to this Court in its determination of whether Richfield has violated Sec. 1 of the Sherman Act or Sec. 3 of the Clayton Act.

The Government can point to no judicial decision wherein there has been held to be a violation of either of such sections under the facts and circumstances here existing. (Certainly neither the District Court's decision nor the decision of the Supreme Court in *U. S. vs. Standard Oil Company of California* support the Government's position for the reasons discussed at length in Defendant's original memorandum (pp. 37-40; 49-52).

Richfield submits that in so far as its relationship with L. O. operators is concerned, the Government's charge is in reality an effort to extend the operation of the antitrust laws far beyond their basic and underlying purpose and intention and into a field with which they have traditionally had no application.

Dated: June 5, 1951.

[fol. 3376] Respect*uf*lly submitted, William J. DeMartini, Robert E. Paradise, by —— ——, Attorneys for Defendant.

Krystal & Paradise, of Counsel."

(Short recess.)

[fol. 3377] The Court: You may proceed.

Mr. Paradise: I have furnished, at your Honor's suggestion, a copy of this brief to the reporter. I do want to point out the highlights of two or more of the most significant cases, your Honor, because I feel that these cases answer, once and for all, this problem as to common law categories.

I do not think it is necessary, as I mentioned during the argument, at the time Mr. King testified, to place any name or designation on this relationship, other than to recognize it for what it is,—a relationship where there is no market and no interference with the legitimate rights of competitors.

I now call your Honor's attention to the decision of the Circuit Court of Appeals in the Carter Carburetor case, cited in our original memorandum, where it refers to whether these service stations there involved were the legitimate customers of other competitors of the Carter Carburetor Company.

Now, the government has taken great pains to put on several competitor supplier witnesses, and the type of testimony that came on with respect to these L-O stations is particularly interesting. By and large, these competitors knew that these stations were owned by Richfield and/or leased by Richfield from the property owner and leased out [fol. 3378] to the operator.

Mr. Ellis of the Pennzoil Company said he got wind of it from Mr. William Hall, that Mr. Hall told him about it.

Mr. Ransom of the Gates Tire Company said he at times inquired at the station whether it was our station, and he was told by the Richfield merchandiser at one time that he was wasting his time, and he understood by that that if this L-O operator, Mr. Sheldon, bought tires, he would get into trouble, and yet Mr. Ransom continued to have a salesman call at the station.

Mr. Christie was a competitive TBA salesman, and he stated an L-O operator by the name of Mr. O'Malley told him he should know better than to ask him, the L-O operator, for that order when there was a Richfield representative at the station.

Mr. Behm testified—and I will give just one more illustration on this—he represented the Leiland A. Irish Company, a distributor of Kelley-Springfield tires, and he related a conversation at one of Richfield's L-O stations—this occurs in the transcript at page 1499—and stated that Mr. Vaughn, a Richfield employee, told him that Richfield had a considerable investment in that location, and it was not Richfield's policy for Mr. Jones, the operator, to purchase from anyone other than Richfield suppliers. Mr. Behm, the com- [fol. 3379] petitor, told Mr. Vaughn, the Richfield man, that he would continue to call on that account, and Mr. Vaughn told the operator, in the presence of Mr. Behm, the competitor's representative, that if he continued to buy from the competitors, that Mr. Vaughn would—and I quote—"lower the boom on him."

I cite those instances for this purpose, your Honor, that these men, these so-called competitors to this so-called market, knew that this was not a legitimate market. They knew they were bootlegging and were trying to sneak their products in at the back door. They knew this was a Richfield station, and that, therefore, they stand in no better position than would a salesman trying to sell a product to the salaried employees in one of the Standard Stations, Inc., where your Honor held that, of course, could not be within the contemplation of the antitrust laws, and the government could not assert it was.

The government is disturbed because there is a lot of testimony in this record that these L-O operators could not buy from these people who offered them products. Some of them testified that there was an advantage in trying to buy on the outside, because they could have gotten a larger margin. I submit, furthermore, that that not only fails to show that this is a legitimate market, but it also shows that these men, in accepting a Richfield station with knowledge of [fol. 3380] the fact that they could not handle any products other than those of Richfield, were committing a deliberate fraud on Richfield when they tried to handle other products, and they deserve no sympathy from this court, as the government suggests, if, at the time they moved out of the station, they had on their hands some unauthorized TBA that they were handling, and tried to handle on the side for their own profit and to the detriment of Richfield's profit.

I submit that the government's position is not only nonrealistic in this case, but it is completely illogical.

The brief that I have filed with the court refers to an article by Mr. F. R. Black in the Georgetown Law Journal, and I commend it most heartily to your Honor's examination. It is entitled, "Exclusive Dealer Devices in the Marketing of Petroleum Products."

We do not subscribe to and we contest vigorously any contention that the purposes or objectives which Mr. Black ascribes to the creator of the "Iowa Plan" that is discussed in there, motivated Richfield, and there is no record in this case that could possibly support any such contention. But that article, your Honor, contains the best definition of what is and what is not an independent businessman that we have

been able to find. It is the one I quoted to your Honor from a week and a half ago.

The government has asserted that the issue in this case [fol. 3381] is whether or not these men are agents or employees. We say that the only realistic approach is whether these men are independent businessmen, on the one hand, or not, on the other. If they are not independent businessmen, this is not a market. If they are independent businessmen, this may be a market, as the government contends.

But in view of the underlying reasons why agency and employment relationships are held exempt from the antitrust laws, those are applicable in equal degree to this entire relationship, and it does not have to be defined. It is completely unimportant that it does not fall into any common law category, as the cases which I have cited in this closing memorandum indicate.

The government, I think, is basing its entire case on a most ambiguous syllogism, that is, they state that these men are neither agents nor employees because there are no wages paid, and, therefore, they are independent contractors, and the ambiguous middle term is that if they are independent contractors, they must be independent businessmen.

Well, that does not follow at all. That is a complete non sequitur. These cases that distinguish an agent or employee from an independent contractor for tort purposes and for purposes of some definition of an employee under a statute are dealing with that subject-matter.

Here we are dealing with the question as to whether there [fol. 3382] is a market, whether there is an effect on competition, and here the question is not whether these men are independent contractors, but whether these men are independent businessmen.

I will file this memorandum, but I want to close with one particular thought. Mr. Dixon, in his closing argument, made what I consider as extraordinary a statement as I have ever heard in a court of law. He suggested the type of decree which he asked your Honor to issue in this case with respect to the L-O stations, and the decree that he suggested was that the Richfield Oil Corporation be enjoined from exercising the 24-hour clause for any purpose other than the breach of the provisions of the written lease.

Your Honor knows that that lease gives either party the

right to terminate that lease on 24 hours notice by either party.

Now, Mr. Dixon's suggestion as to the type of decree, and let's bear this in mind, if their position is correct, what type of decree could be issued in this case. Mr. Dixon's suggestion is this, and this is the most remarkable thing I have heard: Mr. Dixon's suggestion is that this court make a decree enjoining the Richfield Oil Corporation from terminating the 542 sublease of any operator for any violation of any term or provision, oral provision, and to limit it to a breach of the provisions of that written form.

[fol. 3383] The Court: Well, here he merely means, or I think he means that he takes the view that these conditions which are restrictive in nature are based on oral understandings, and if the court should hold with him, that the conditions imposed as to the limitation of the products are invalid, then of necessity you would be enjoined from considering that as a condition of breach of the lease.

Mr. Paradise: That is not Mr. Dixon's statement.

The Court: That is my understanding of it.

Mr. Paradise: Mr. Dixon's statement to this court is that the decree should enjoin Richfield from terminating this lease upon anything other than the written conditions.

The Court: When I get that far, I will tell you the type of decree I want. That is one thing I have done all my life, and it gets me into trouble at times. I sometimes regret I did not follow the advice of Judge Hauser, the father of the present judge, who, when I went on the bench, told me not to write opinions or give any real reasons for having opinions. He said that you immediately start an argument. I have never followed that advice, and whenever I make a ruling, counsel never have any difficulty finding out what it is about. Therefore, I seldom have any trouble about findings, because I indicate what the findings are.

In the case of Standard, in addition to the conclusions of law, I picked out eleven specific findings. So, as a matter [fol. 3384] of fact, we had no difficulty, although we did hold a hearing on findings. I think there was a modification in just one or two. I think only one page had to be rewritten, if I remember correctly. So you don't need to worry about the form of decree, because when I get that far, I will tell you.

Mr. Paradise: Yes. I use these illustrations to show the fallaciousness of the government's approach. Mr. Dixon says he doesn't recognize this oral arrangement, this oral understanding. I don't know whether he doesn't believe it, or whether he merely claims it is illegal. If he sought to have us limited in his argument to just the written provisions of the lease, would Mr. Dixon permit us to enforce the rules with respect to uniforms, or hours that the stations remain open, or the number of employees, or the cleanliness of their appearance, or the stations, the pump island procedure, or the credit card procedure, or no competitive signs, or the merchandiser's instructions as to how to operate, or would he approve of all of those conditions except the sole one that this is for the purpose of handling Richfield products.

Would Mr. Dixon have the court in its decree in this case write a new term into this contract? Because Mr. Dixon's approach to this problem is this—and, Mr. Dixon, I am using your name, and will you forgive me? I refer to the government. It is the government's approach to this matter [fol. 3385] that this man, this L-O operator, who now has by the government's approach this windfall of having a station, at which he is paying two-thirds of the fair rental value, should now be permitted to remain in there for the rest of his natural life, the only condition being that he is to pay the gallonage rent, whether he handles Richfield's products or not?

I submit to the court that is the most drastic thing I have ever heard of. That goes far beyond divestiture. Divestiture in a decree in a monopoly case would permit the defendant to dispose of his property for the fair sale value.

The decree the government suggests, which is consonant with their entire theory as to the L-O operators, is that this man should be permitted to stay there forever, for life, at less than the fair rental value, and that Richfield should bear the cost of it. That, I submit, is what Mr. Dixon says is the Department of Justice's concept of "The American Way," to quote his last argument.

If the court should determine that the relationship is not as we suggest, one that is wholly exempt and not cognizable under the antitrust laws, I submit that the court must nevertheless then examine, under both the Sherman Act and

the Clayton Act, the question of reasonableness, and the question of substantiality, and I submit that if the analysis of this problem ever gets to that point, that there is no un- [fol. 3386] reasonableness and there is no substantiality, particularly when the number of stations and the amount of commerce involved is viewed in the light of defendant's Exhibit W, which is the statistics showing that over 81 per cent of these stations were self-created by Richfield. They were never taken away from competitors. Competitors' products were never sold in them. They were created by Richfield, and your Honor will recall the language in the Columbia Steel case. The question is, and the real question is, whether Richfield has unreasonably interfered with the opportunity of its competitors to market their products, and there isn't a word of testimony to that effect in this record.

In conclusion, I would like to thank you, your Honor, for the attention and patience throughout this entire case, and I express the appreciation of Mr. DeMartini as well.

The Court: All right.

Rebuttal Argument

Mr. Dixon: May it please the court, I wish first to correct in my remarks the comments of counsel with reference to the alleged lack of evidence applicable to the 337 and the 3-C type of arrangement.

The defendant has suggested that only four or five witnesses who operated such outlets testified on behalf of the government. I think the defendant has overlooked the fact that the testimony of former employees of the defendant was given concerning these stations and outlets, and the [fol. 3387] practice of the company with reference to the restraints complained of as against those outlets.

For example, Mr. Cowan, who was a salesman, and your Honor will recall that salesmen contacted only the 337 and 3-C types of outlets. He testified with reference to the conversations had with those dealers, the dealers operating that type of outlet, and this is in the record at page 286, "that the same precise conversation was applied" with reference to those dealers as was applied to the L-O type in

enforcing the program. He proceeds and says, and this is at page 287, "the same idea was discussed in probably a little lighter flavor."

[fol. 3388] I believe that language describes the approach and restraint as applied to these outlets as well as it could be described. It was obviously not strong in its application, because the sanction was a little less evident in these outlets as it was with the 24-hour clause always present to apply to the L-O dealers.

The witness Mr. Scollard, also a salesman for the defendant, testified concerning the policy of the company with reference to the outlet which he conducted, and his statement at 982 was, that the policy was that they were to handle just nothing but approved merchandise. And examples thereof, some of the signs in the Kawalski and the Carver stations were further testified to in his testimony.

And then Mr. Duarte, another former employee, a bulk plant distributor—perhaps you might not call him an employee—but he was certainly a representative of the defendant who sold petroleum products and TBA accessories to all outlets, and his testimony came out on cross examination at page 318, when he was being asked with reference to the painting agreement. And he says:

> "As far as I could remember, six years back or better, that was a painting agreement, and all I can tell you is this, that Richfield would preach to us this thing, that that painting agreement, while that station was painted Richfield colors, they asked us to tell the oper-
> [fol. 3389] ator that while those Richfield colors were there and they spent money to paint it, that they shouldn't handle anything but Richfield products."

Now, there is the additional testimony of three former representatives of the defendant concerning the 337 and 3-C type of stations with reference to the TBA and the petroleum products phase of the case, and the restraint imposed on them to buy those products.

Much has been said in this case about the nature of these arrangements by the defendant, and they have endeavored to justify their lease under the 3-C type of arrangement on the ground that they had an investment in the property.

And the same argument, your Honor recalls, was made with reference to the justification for the restrictions on the L-O type of arrangement.

We direct your Honor's attention to Exhibit 28 in the record, where one of the operators under the 3-C type of arrangement notified the company that he wanted to cancel his lease, that is, the underlying lease, and this exhibit, which is a company memorandum, reports this request. And on April 27, 1949, Exhibit 28 shows that Mr. McCracken who purchased the property subject to the lease—that would be the underwriting lease in the 3-C deal—

> "just recently, Mr. McCracken advised our people that [fol. 3390] he intended to serve us with a notice to relinquish our lease inasmuch as he wished to put in another brand of gasoline and operation the location as a cut-price station."

And then the memorandum goes on to say that:

> "This is the first time that I recall that we have been faced with a test on our 3-C proposition and while I recall from past conversations with you that it is extremely doubtful as to what extreme we would go to enforce this paper, nevertheless, I wish you would advise me just how far we can go and what reply we should make to McCracken when he serves us with a notice to vacate."

And then Exhibit 28-A contains the reply to that letter, in which it is pointed out:

> " 'If and when McCracken serves us with a notice to vacate, I think we should advise him that we have a lease which we intend to enforce. However, realizing our position is not too strong, it looks like it would be better business to attempt to work out something with McCracken on an amicable basis, not in any way indicating, however, that we consider our position a weak one.' "

Now, what is the import of those two documents? Simply this, your Honor: That we submit that this shows a recog- [fol. 3391] nition by the defendant of the fact that this ar-

rangement that they have set up here under the 3-C type of deal did not have, or, to say the least, there was a question of legality about that type of arrangement. But the control and the power to control it, when it was questioned, if it ever was questioned, was there.

And in an antitrust case we are concerned with the existence of the power, as well as the ability and intention of the holder of that power to exercise it where it does have the effect of restraining interstate trade and commerce.

And the other provisions that we have pointed to in our argument in chief all are along that line. An examination of all of these forms shows that it was the company's policy, the defendant's policy, and that it was expressed in the written forms of the agreement which they prepared, and there was substantially never any deviation from it. And, for example, the Exhibit 5-G, which is the last form of the sales contract, paragraph 1, while imposing an obligation upon the buyer under the arrangement of the 337 type of sales agreement, gives the seller or the defendant any number of outs if they care to exercise them for failure to deliver the gasoline contracted for under that form of contract. And I direct your Honor's attention to the language of that paragraph because it is, I submit, as broad an outlet from an obligation in any contract that I have ever [fol. 3392] seen.

I mention that again merely to point out to your Honor that I believe those provisions—and that is, perhaps, the weakest one of many that we have referred to in these written forms of contract—gives to the defendant, the other party to those contracts, the power to enforce restraint, and it has been exercised, as the testimony that I have just referred to is, and has been over these 3-C and 337 dealers.

And the final summary, of course, of that absolute exclusive nature of the gasoline and of this business is the testimony of Mr. King in which, on page 198 of the record, which was very early in the trial when we were discussing that, he said:

> "It is not our policy to supply"—— And I direct your Honor's attention to the word "supply." "or solicit the business of split pump service stations."

In other words, no station which would want to handle or which would desire to handle any other competitive products under the admitted policy of this defendant could do anything other than handle Richfield gasoline on a 100 per cent basis. And that is true without reference to the provisions of the written sales contract, and that was conceded by the testimony of Mr. King in t e record, 1864-5, when I specifically asked him whether or not it was not a fact that [fol. 3393] under these new forms of agreement, the Exhibit 5-G that I have just mentioned, and with respect to the 3-C sales type of contract, that in spite of the so-called minimum-maximum provisions, that it was not a fact that the other party, or the dealer, to that contract arrangement always purchased 100 per cent of the petroleum products, gasoline, from Richfield while it was in force, and he conceded that that was the fact.

So that in the antitrust laws, as your Honor has so well stated, we are concerned with not so much the form and the particular language that is used, but we are concerned with the device and the means and methods whereby that device is used to accomplish and effect an unreasonable restraint of interstate trade and commerce. And that is always the question that we come to in these antitrust cases, as your Honor has so ably stated in discussing the matter during counsel's argument in chief.

Now, just one final word with reference to the testimony on this independent status of operators. I direct your attention there to, again, the statement of Mr. King in Volume 2, page 223, where, after your Honor had asked him some questions concerning the independent Richfield dealers or the Richfield dealers, he stated:

> "We do feel, ourselves, that these men are operating on their own."

So that I do not know just what the test is, your Honor, [fol. 3394] that should be applied to determine whether or not these men are independent businessmen. Language, of course, may mean different things in different situations. But the fact is that, to summarize all of the testimony applicable to all three types of these dealers, whether it is one operating under an L-O arrangement or one under the 3-C

or one under the 337, that when you apply the microscope to see what they are really doing, I do not think it can be seriously questioned but that they are engaged on their own in an independent enterprise of buying gasoline and petroleum products and automotive accessories for the purpose of resale to the consuming public at a profit to themselves.

Now, that, in substance, I believe is what they are doing. And in connection with carrying on that business—and I submit that that is a term that is properly applied to those transactions—they engage in the purchasing of those products from this defendant, and they are buying them for the purpose of resale. They are not handling them in any sense of the term as an agent or as a factor or any other term that might be used to describe that relationship.

I submit that the only term that is properly applicable to that relationship is that of a "buyer and seller of products." And under the arrangement here we find that that buying and selling arrangement is confined and restricted to an exclusive agency.

[fol. 3395] And on the basis of the decision in the Standard case and under the appreciable segment doctrine, why, we submit that the market here—and there obviously must be that market—has been foreclosed to all competition by reason of these restraints imposed upon them through the understandings and contracts involved in this case.

Now, I briefly want to refer to a few other comments and arguments made by the defendant. They try to distinguish it from the Standard case. They have said a lot of distinctions, but your Honor well recalls that in that case for all of the arrangements Standard had what they called a market observer, I believe was the term applied, who went around to all of the types of stations to police them, to see whether their restrooms were clean, whether they wore uniforms, whether they wore the tie and the other things that they were supposed to do.

There isn't any difference in the regulations that this defendant tries to impose upon the L-O operator and the things that Standard try to do with the operators of all of its outlets.

And an examination and review of the record will show that many, many instances of the same type and character appear in the Standard case as appear here, and there

is not, I submit, any difference in degree between the two situations, and substantially none in fact.

[fol. 3396] Now, the defendant contends, further, that they changed their contracts. They say: Look what we did here with reference to the 3-C and the 337's in 1948.

Well, we submit that that does not make this question of restraint a moot one. The question is still there. What they saw fit to do in 1948 they can do again after the termination of this case.

The question that we are concerned with is as to whether or not there is still a restraint imposed and likely to be imposed unless this court acts to prevent it, and that is what the Government is asking this court to do in the event it enters a decree for the Government in this case.

I want to comment briefly—I had overlooked it—on this Exhibit X, I believe it was, which was a statement to the effect that the defendant had lost a lot of 337 stations. They say that they lost a lot of accounts.

Well, I direct your Honor's attention to the cross examination of Mr. Semple who made that exhibit, and your Honor will note that on page 1988 he testified:

> "Q. Do you know how many of these so-called lost accounts were terminated by Richfield?"

His answer was:

> "No, I do not.
>
> "Q. Did you try to figure how many of them were terminated by Richfield, in compiling these statis-
> [fol. 3397] tics?
>
> "A. No.
>
> "Q. Do you know how many of them were cancelled by the dealer?
>
> "A. No, that follows, because it would be the balance of the accounts lost."

Well, I do not think that follows at all from that arrangement. But let us assume for a moment that they did lose some accounts, what are the facts in this regard?

That is not the important consideration. The record shows that since 1940, through the period, I believe it was 1938 through 1948, which was the period used by counsel

for the defendant, that there was an actual increase of the 337 type of outlet from 881 on December 31, 1945, is the date I believe was used, to 1,361 on December 31, 1950. In other words, there had been a substantial increase of almost 500 of those types of outlets, regardless of how many they may have lost during that period, if you want to regard the cancellation by a dealer as a loss of that type of account.

But furthermore, the important thing, I believe, to note is this—and this is important under the Clayton Act provision in this case, the application of it—that these outlets have increased to which these contracts are applicable of the type complained of, and that the gallonage or the sales of gasoline to those outlets increase from 8,706,000 in De-
[fol. 3398] cember 31, 1945 to 13,480,000 gallons at the end of 1950. And the dollar volume had increased from $966,000 to over $2,117,000.

So whether they lost accounts or not, the fact is that Exhibit 26-A of the Government's case shows that these types of stations to which these contracts are being applied at the present time, and have been applied, have in fact increased over the five-year period, and that the volume of commerce has substantially increased, based upon the figures that are just submitted to your Honor which are in the record.

Let us just go briefly to the argument on the L-O type of stations. We submit here that there is no justification of the type that defendants have submitted here or the type of arrangement complained of. Their justification appears to be that they can't depend on independent dealers for their outlets, so they had to develop the L-O system.

Let us look at the record.

The record shows that even before they had an expansion for refining facilities during the war period—and they claim that was the reason they had to go out and develop further the L-O system—that this system had been in effect since 1937 and the only change that was made in that arrangement insofar as the written form of it was concerned was the insertion of the 24-hour clause into the sublease in 1943.

Now, the acquisition of additional facilities, whether it [fol. 3399] is refinery facilities or a discovery of new oil

fields which gives them an additional source of supply, obviously does not justify the creation of a restraint on trade and commerce if in fact that restraint is an illegal one, and certainly that is no excuse to make it a reasonable one under the Sherman Act.

They say further: Why, we have not increased the number of L-O stations since 1940, and that is a fact. The record shows that they had 1,412 or so in 1940. They had 69 less at the end of 1948, or 1,343 of them. But that is not necessarily the significant fact.

The significant fact in the record is that the gallonage of gasoline sold in these outlets, even though they had diminished in numbers, which represents the increasing market covered by these outlets, increased from over 94,000,000 gallons, a $9,000,000 volume of commerce in 1940, to 160,000,000 gallons and over $23,000,000 of commerce in 1948. Now, we submit that the justification of an investment in this property by the defendant is no justification in fact at all. That it is not applicable to the 3-C type of arrangement, and it is no more applicable to the L-O type of arrangement because, if they want to protect their investment, there is every opportunity given to them to do so by providing for the provisions, as they have in the lease which they enter into with the L-O operators. I submit that an exami-
[fol. 3400] nation of the provisions of that lease will show that this defendant has taken every possible precaution to guarantee a full and adequate protection to any investment that they may have in this property. So obviously that is no justification for the action which they have taken here.

Now, coming to the close of the legal argument in this case I would like to briefly comment upon the Sherman Act. Your Honor has done it and is thoroughly familiar with it. But your Honor is familiar with the fact that our country is the only government in the world, the only country in the world which has any Act comparable to the Sherman Act and the Clayton Act and the other forms of antitrust laws.

Our system is one under which we have full and adequate protection for the civil rights under the Bill of Rights and the Constitution, and maintain our democratic form of government. But it is not enough, the Congress decided, to merely provide for those.

It is necessary and equally as fundamental that we maintain and protect our free enterprise system. And it was on the basis of a recognition of that fact that our country is grown great and is what it is today, because it is founded on a free enterprise system, which is based in turn on a competitive economy, that the Sherman Act was enacted in 1890.

Congress exercised all of the power that it had over interstate commerce under the Constitution in enacting that Act, and the Supreme Court has many times so stated and [fol. 3401] restated. So that the scope and purpose of the Sherman Act is to maintain our system of free enterprise and our competitive economy, and the late Chief Justice Hughes referred to the Sherman Act as "a charter of freedom," and he says that it has the generality and adaptability comparable to that found to be desirable by any constitutional provisions.

But the purpose of the Sherman Act, in substance, is to maintain the system. And when we have the rights of economic power or the existence of that power, that in and of itself, of course, is no violation of the Sherman Act. But when you have the exercise of that economic power to emphasize restraints on our interstate trade and commerce, or foreign trade and commerce, then such action of the exercise of the power constitutes a violation of that Act. And that is true whether it is Section 1 or Section 2 or Section 3 of the Sherman Act.

In this particular case we have this oral arrangement tied in in the manner that your Honor has referred to, and the evidence shows the written form of lease. It is, in a sense, perhaps a part of it, but certainly there is no part of it except the 24-hour portion which deals with the trade and commerce here, and that is only a sanction to enforce what the Government contends is the illegal arrangement that is made at the time this written lease is entered into.

It is the exercise of persuasion or the coercive power [fol. 3402] lying back of that 24-hour provision that is the vice of this arrangement. And, as Mr. Justice Douglas stated in his dissent in the case of *Ford Motor Company v. U. S.* in 335 U. S., 343; 69 Supreme Court Report 93, at 103, when he was discussing and commenting upon the power of

Ford to force his dealers to take the Ford financing plan, the same as the Supreme Court had previously held was illegal in the General Motors case where General Motors had tried to force its dealers to take the General Motors Acceptance plan as part of the deal. And Justice Douglas said:

> "Due to force of power what dealer could afford to draw a nice distinction between persuasion and coercion."

And that is applicable to this case. What dealer could afford under most circumstances to draw a nice distinction between whether he should handle all of the products of the defendant on an exclusive basis, or whether he would try to do, even though he needed it to carry on his business, to handle some competitive gas under the counter?

The evidence here shows that some of them did, and that is part of our American tradition and of our free enterprise system, and it is a commend on their Americanism that they saw fit to do so.

But the point is that many others of the dealers did not see fit to do so because, as the testimony in this case shows, [fol. 3403] one of the dealers says they could not afford to take the risk. The power is there, and it is vested in this 24-hour cancellation clause. It is not expressed in writing, and that clause is only exercised, the evidence shows here, when the dealer is not delivering and complying with the 100 per cent arrangement that he has to enter into at the time he enters into the written lease.

Your Honor has referred to this power in the remarks which he has made, and particularly referred to the American Column and Lumber Co. v. United States, where a very potent and very effective statement is made on this question of power, which I believe is perhaps applicable to this case, as it is to all antitrust cases. There the court said:

> "Words of advice, seemingly innocent and perhaps benevolent, may restrain when uttered under circumstances that make advice equivalent to command, for the essence of restraint is power."
> At 122.

That is what the defendants have exercised and have hanging over these dealers, and which gives them the sanction to enforce this restraint. The 24-hour clause is the key to this whole situation. It may and probably would have a restraint without it, your Honor, if the written provisions were contained in the lease, as they were in the Standard leases and the Standard contracts. But they have not seen [fol. 3404] fit to do it here.

That is the only difference between the Standard case and this case. Standard did it in writing. They put it in the lease. Here the defendant did it orally, but in either event the restraint was there and it was imposed, and the restraint was unreasonable under the Sherman Act because it did restrict and close out and lock an appreciable segment of interstate commerce from all competition.

And it did have the tendency, as the Supreme Court, as well as your Honor held, to tend to create a monopoly in this field and substantially lessen competition.

If the Government is right in its position here, then this arrangement is not enough to get around the decision and the holding of your Honor and the Supreme Court in the Standard case.

If the Government is wrong, then I say to you that this is one of the most clever devices to circumvent a decision—not intentionally, perhaps—but in fact it will have that effect of circumventing a decision which has held in substance the same type of arrangement illegal under both the Sherman and the Clayton Acts.

So in closing, we feel confident, your Honor, that as you examine the record and go over these exhibits you can only come to the conclusion that you have here in substance substantially the same type of restraint, perhaps placed into [fol. 3405] effect and made operative in a little different manner. But you have the same type of restraint operating, substantially the same market and the same type of market as was present and was presented to this court in the Standard decision.

We feel that the relief requested here in the prayer of the complaint should be granted and that your Honor should find that the Government, in the interests of the public, the people of the United States, are entitled to a finding that a

violation exists here, and a decree which will effectively remove the restraints complained of.

The Court: All right, gentlemen, anything further?

REPLY

Mr. Paradise: I did not expect to have the opportunity of a reply, your Honor, but I would like to say a few words.

The Court: You have been on all this time. I think we ought to take a few more minutes and we ought to give you the last words.

Mr. Paradise: Thank you, your Honor.

I am somewhat puzzled by the Government's approach to this problem. They say that in the independent dealer situation, the 3-C deal and the 337 deal, that what is wrong in the contract is completely unimportant. What we must do is look behind the contract to see the practices.

In the L-O situation they say what is written in the contract is the only important thing. We must look to the [fol. 3406] contract and we must ignore certain things, and if things have been left out of the contract, that is where the grievance is.

If that is the Government's case, I submit that it is completely unintelligible to me. On the independent dealer situation, I submit that if you should look at the contract or look behind the contract and examine this record, there is not one iota of evidence, not one scintilla of evidence of restraint, and this is not a question of conflict of evidence. This is a complete absence of evidence.

The evidence is that all independent dealers—and when I say "all"—the testimony is over 75 per cent of them handle competitive lube oils and greases and TBA.

Getting back to the L-O's, however, because that is much more important, I can't see but what the Government's argument defeats itself. It drives itself into a complete absurdity.

The Government is talking about looking behind form to substance when they are talking about the independent stations, but if you will apply that same measure and equation to the L-O stations, the result is inescapable that what is here involved, regardless of what you call this relationship, there is no market.

The Government's argument defeats itself for this reason: The Government admits, as it must, that if the Rich-[fol. 3407] field operators of these stations be salaried employess, there would be no violation of the Sherman Act and no violation of the Clayton Act.

The Government admits, as it must, that if the men in these stations were factors or agents, and if, without a single change of any character, realistically, if there was only one bit of difference, if Richfield retained title and this was a consignment, then without the slightest change in the evidence as to any other matter or respect, the Government would admit and acknowledge, as it does, that there is no violation of the Act, because what a principal does to his agent cannot affect commerce.

We say that that is putting form above substance if that doctrine was ever applicable to a situation.

Here what we do to these operators is a matter not of power but a matter of right. These men know this before they come in, and that is one of the tests which has been applied in that group of cases to which I referred your Honor. I think that to restate anything further would merely be to labor the point.

The relationship is important only in respect that it must recognize and that a recognition of the relationship must show that this is the same, for all practical intents and purposes, as if these men were salaried employees, as if these men were agents.

[fol. 3408] There is no different effect on the Pennzoil Company whether this man is in there on a del credere agency basis, or if he is in there on a buy and sell basis.

In the Pictorial Review case they say that we recognize that this is a buy and sell, but they say that this is just a convenient method of bookkeeping. He could just as well be in there on a commission basis with a retention, that it won't make any difference.

That is the only difference the Government is complaining about. This entire lawsuit is just a tempest in a teapot. It means nothing if that is the only difference that they are complaining about.

I submit that that is the only difference, and that the question of whether or not Richfield pays social security taxes, whether Richfield guarantees these men a fixed income

by way of wages, whether Richfield guarantees or covers them by workmen's compensation is completely irrelevant. It is a non sequitur. It is an absolute non sequitur.

Maybe the purpose of the Government is to enforce social security laws. But if it is, they should proceed under the social security laws and not under the antitrust laws.

Maybe their purpose is to enforce minimum wages, but they can't do it and should not be permitted to do it under the disguise—and I say "disguise" advisedly—of enforcing the antitrust laws.

[fol. 3409] It seems to me that the position of the Government here is that if Richfield does not have these responsibilities, that it is worried about. And I say we have them. And I point to the last case, that Hayes case, in the California District Court of Appeals, that we have all the responsibility for the acts of this particular L-O operator, a man named Mr. Scavone, an L-O operator.

The Government's worry seems to be that if Richfield does not have these responsibilities, which it has, then as a penalty under the antitrust laws we can't control what should be sold in our own stations. If there ever was a non sequitur, that is it. Because the antitrust laws were not designed as a penalty to someone who failed to pay social security taxes, for someone who failed to maintain minimum wages, or for someone who failed to adhere to the workmen's compensation laws.

If that is what they are worried about, that should be prosecuted in some different form and under some different Act.

But I submit that there is no antitrust problem here involved.

The Court: All right.

REPLY

Mr. Dixon: The Government does not think it necessary to have the last word, but I do want to comment on what——

The Court: Just a moment. Go ahead. I am trying to get some books.

[fol. 3410] We feel that the position of the defendant is strictly that they are begging the question by the type of argument that they have made, because when they refer to these L-O stations as the defendant's stations, they com-

pletely ignore the fact that they have surrendered all rights to the control of those stations and the possession of those stations by the lease they have entered into with the dealer.

The Court: Just a moment. I want to call attention to one case. I don't know if it is a disadvantage or an advantage, but one of the incidents of a judgeship for so long a time as I have occupied it, during the course of which I have written many, many opinions, some 250 of which as a District Judge have been published, in addition to those I have written pro tem on the Court of Appeals, in addition to the many I wrote while a judge of the Superior Court, and which, of course, were published only locally, and also on the little Supreme Court, that is, the Appellate Department of the Superior Court, where I wrote opinions, and then I was pro tem on the Court of Appeals, and I wrote opinions there, and there are so many now that whenever a problem arises I find something that may bear upon the discussion. While we were discussing the problem of relationship, I happened to think of a case of mine, in which I wrote an opinion, involving the Wage and Hour provisions of the Fair Labor Standards Act. It is McComb v. Dessau, de-[fol. 3411] cided last year, and it is reported in 89 Fed. Supp. 295. We had the problem there once more of deciding what a particular thing is. The Fair Labor Standards Act exempts from its provisions small newspapers which have chiefly a local circulation, not exceeding 3,000. It is Section 213(a) of the Act. It has been increased now to 4,000, I think, but at the time it exempted from the provisions of the Act weekly or semi-weekly newspapers of less than 3,000 circulation, the major portion of which circulation was within the county where it was printed and published; as I say, that is Section 213(a) of Title 29. The section was amended, as I said before, and the minimum circulation was increased to 4,000. The defendant published four newspapers in four beach cities, "The Hermosa Beach Review," "The Redondo Beach Review," "The Manhatten Beach Review," and "The Palos Verdes Citizen." He tried to claim that each of these separate newspapers were separate units, as none of them had a circulation exceeding 3,000, and that he was entitled to the benefit of the exemp-

tion. This was the answer I made. It is very brief, and I will read it to you:

"The printing establishment of the defendants is conducted on a unitary basis. At their plant at Hermosa Beach, California, their newspapers are printed and published. The employees are employed, not by each newspaper, but by the publishing house. They [fol. 3412] are paid by the defendants regardless of the newspaper on which they work. In truth, all employees work on all the newspapers. The newspapers are published on different days and when the work on one is completed, the work on another is begun. No books of account are kept segregating the work or earnings of the persons employed in the production of these newspapers or apportioning their time or wages to a particular newspaper. So that each employee is employed on the production of all four newspapers. Assume, therefore, that if we were dealing with the different employees of each of these newspapers we would be compelled to reach the conclusion that they are within the exempt class. Nonetheless, the fact remains that we are dealing with the employees of the defendants and not with the employees of each of the four individual newspapers which the defendants produce. In sum, we have before us their employees and not the employees of the individual newspapers. The individual newspapers have no separate or distinct corporate or business entity. Each is merely one of the ramifications of the publishing business which the de- [fol. 3413] fendants conduct. The defendants have chosen to conduct their business in this manner, and to publish several newspapers as a unitary project,—with one management, under one business and editorial direction, and in one plant,—they cannot now segmentize it in order to claim the benefit of the exemption, which applies to small, individual newspapers having distinct being. As said in Bennett v. V. P. Loftis Co., . . . 167 F. 2d, 286, 288: 'If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down

into its various phases so as to defeat the purpose of the Act.' As all the employees participate in the production of all the newspapers, they should not be deprived of the benefits of the Act by an artificial separation and apportionment of their work to the four separate newspapers, which does not correspond to the actual conditions under which they are employed. Such a segregation would be the more unjust in a case of this character, because the newspapers are not only the product of a single enterprise, but they are, in truth, the same newspaper. They contain, except for an occa-
[fol. 3414] sional change, the same reading and advertising material, and only the change of masthead and the different areas of circulation make for distinctiveness. Such complete, unified operation calls for a like unity test in determining employee status. And the application of such test commands denial of the exemption claimed by the defendants."

I am not referring to that to decide the question one way or another, but to point up the proposition that when it comes to establishing what the relationship is between the parties to a transaction, we bear in mind the realities of the situation, not what the people call it. The second thing we bear in mind is the statute that we are interpreting. So here I was interpreting what? A statute of the type Mr. Paradise mentioned in his argument, where the question was whether the benefit of a statute should be extended to an employee. In view of the object of the statute, in view of the fact that I found a publishing company publishing four different newspapers in one plant, I had no difficulty in determining that, the two things being considered, the only realistic conclusion to arrive at was to treat the enterprise as a whole, because the employer had so treated it.

So the same principle underlies here. In order to determine the issue here, I must bear in mind, first, the type [fol. 3415] of statute we are interpreting. I am not interested in whether Richfield should pay social security tax for the L-O operators, or the others. To that extent Mr. Paradise is correct. I am not interested in whether they may be violating that law. I am not interested, furthermore, whether they are by their contentions subjecting themselves

to a possible contention on the part of the state agencies and the federal agencies that possibly, in view of their contention of complete control they had better make them the agents of the government for the collection of Social Security tax. I am not concerned in what effect a ruling upon the issue before me would have on collateral matters. The main concern is to determine whether the relationship which exists as to these three types of stations is such as to invalidate the restrictions which have been imposed on them.

As to the L-O stations, I think you are agreed with me that the question is purely one of law. I reached that conclusion after the first week, and I am glad you gentlemen have come around to my way of thinking.

As to the other two, I believe the question is not so much one of law as a question of fact, because, while it is true as to both of them, these restrictions or interdictions are oral, the absolute control as to the L-O station is admitted, while as to the others it is denied, and testimony has been offered directed at the contention that other than urging there is [fol. 3416] no compulsion and that no penalty is exacted, and there is evidence in the record to that effect, in fact, pictures have been produced showing that at some of the various stations covered the operators openly exhibited other products. So it is for the court to examine the evidence as a trier of fact, as to the types of stations, and determine whether substantial evidence exists, on which a finding could be based as contended by the government. But as to the other, the question is purely one of law, which I will work out with the assistance which you have rendered me in your argument and in the memoranda which you have filed.

So, now, gentlemen, I want to thank you for the fine and gentlemanly manner in which this law suit has been conducted. I think your co-operation in following the court's suggestions has resulted in concluding this case in less than half the time that was actually anticipated. If I were living in New York, in the Southern District, the Chief Judge would now send me on a vacation for four or five weeks. That is what they do. After a judge has had a long case, he gets time off, in addition to the three months that they actually close. But being in the Southern District of California, as I told you before, not with any complaint, I have to go on with other work.

I will say, however, that I will get to work on this as [fols. 3417-3420] quickly as possible, immediately, in fact, and try to formulate my thoughts. I do not think this case calls for the elaborate opinion that the Standard case called for, because the groundwork of the law is laid down in the two cases, so that a shorter opinion, not to exceed 15 or 20 pages, I believe, will be adequate to summarize my conclusions as to the problems here involved. I will get to work on the matter as quickly as I can. One disadvantage of having a reputation of working fast raises questions, such as that raised by Mrs. Brease, who has been reporting this case for some of their journals. She wanted to go away for a week's vacation, and she wanted to know if I would decide this case before next Wednesday, when she got back. I could assure her that there would be no likelihood of my deciding it that fast. You may tell your people that I work fast, but not that fast. Perhaps if I had no other work, and I could devote a full week to working on this matter, I could do it, but with other work I think it will have to wait a little longer.

So thank you very much, gentlemen, for your co-operation in the matter, and you will hear from the clerk as soon as the decision is made. I shall follow my usual custom, and either in the same opinion or in a separate one, decide the findings upon which any judgment I may render should be based, so that there will be no difficulty in preparing a set of findings that will conform to the conclusions I reach.

[fol. 3421] Los Angeles, California, Wednesday, August 1, 1951. 10.00 A. M.

The Court: Gentlemen, I called this hearing, more or less informal hearing, to discuss the findings and the proposed objections. Under our rules we very seldom have any hearings, because we have adopted the State practice, that is, allowing five days to the losing side for objections to findings, and ordinarily, if there are any suggested changes which the court approves, it is my custom to make the changes and rewrite the pages, if necessary, and notify counsel.

However, in a case of this character, and because I am leaving the city to go to San Diego for a two weeks session, I thought that I should inform you what my reaction is to the proposed findings and to the objections.

I think, on the whole, the findings conform to the court's decision, and I followed the precedent which I have established for cases calling for complex findings, by outlining certain specific findings as a part of the decision.

I follow that in many instances where I deem it advisable to translate, as it were, the legal opinion into specific findings, so there cannot be much argument about what the court intended to find.

I just concluded a civil antitrust case, which followed yours, and I am working on an opinion on that, and I am going to adopt the same system of determining specific [fol. 3422] facts in addition to giving a general basis for the conclusion.

I have studied very carefully the objections, and I think, aside from some specific objections to the decree, the objections are classified under two headings:

The first are specific objections, the objection of which is to place into the findings a theory of differentiation between the L-O and other operators. If I adopted the first group, the conclusions would not stand, and if we had such a thing in our procedure, as we have in the State Courts, and that is a motion for a different judgment, why, the moment I sign findings which incorporated these suggestions, I would have to give judgment the other way.

The second group is even more objectionable, because it places in the record the legal theorizing of the defendant, on the basis of which they sought judgment,—the theory that they were not in competition with anybody, that it was their market which they had created, and the whole object of the objections that begin at Subdivision B is merely to put in those facts upon which the argument is based.

I am not disputing that these facts are sustained by some evidence in the record, but it is not the object of the findings to set forth in detail the facts upon which the defendant's theory is based.

Having reached the conclusion that the L-O stations are independent operators under a leasehold, the only facts that [fol. 3423] should go in are the facts which are there, namely, the description of the instrument, the conditions under which they are held, and such facts as are referred

to in the opinion that show the actual relationship between the parties which lead to the conclusion.

I think the objection that was raised to the finding or conclusion as to the 24-hour clause is not well taken. The meaning and effect of the clause was before the court, and while it is true that the court's jurisdiction is derived from the fact that this action arises under the antitrust laws, if, as a part of the exercise of that jurisdiction, it becomes necessary to determine a question according to State law, the court has the right to do so, and the defendant having insisted and relied on the 24-hour clause as buttressing their theory of control, it became necessary for the court to point to the fact that by State law, as I understand it, that clause, if ever questioned, would not be held to be a 24-hour termination clause, but that the courts would determine the leasehold as being at least a leasehold calling for a 30-day termination clause, because that is the minimum rental period.

I do not think I want to say anything now about the decree, because the objections are limited to one or two matters that I think might be adopted for the sake of clarification, although it may well be that counsel are unduly [fol. 3424] alarmed by the apparent language, and, if necessary, I may before the hearing is concluded suggest some changes.

I thought I would express to you my views, and I will hear anything further you desire to say, or any specific remark regarding any specific objection. I think the object of objections to findings is or should be to make the findings conform to the announced decision by the court, and as the court has announced its decision in a very elaborate opinion and made specific findings, while counsel are free to insist on their theory, I think it is not the objection of findings to set forth facts that will sustain the other theory. The facts are in the record, and upon that basis the argument can be made to the higher court.

The findings in this respect follow the pattern which was followed in the Standard Oil case. There the defendants had a theory of competition which they sought to stress, namely, that there can be no monopoly and no control of the market when six or seven other companies in the same field are engaged in exploiting their own products through

some type of control over stations. I put nothing in the findings to that effect, although the facts in the record enabled counsel to place before the court their theory drawn from these facts.

For the same reason I am of the view that all the differentiations and all the theories which counsel desire to [fol. 3425] advance, which would distinguish this case from the Standard case, can be argued to the higher court on the basis of the record, and they have no place in findings the object of which is merely to state the ultimate facts on which the decision is based.

That is my feeling, gentlemen, and I will hear whatever you desire to say before we take up the specific objections to the form of the decree.

Mr. Paradise: As I understand it, if the court please, the failure to make particular findings is the equivalent of a determination that the facts so requested to be found are immaterial. I don't desire to press the matter. I am fully appreciative of your Honor's remarks.

The Court: Not that they are immaterial. They need not be set forth in the decision because, at most, they are contrary inferences which you would draw to support your theory, which I have rejected, that is all, and you are not entitled to that in findings. The record is there.

In other words, as a matter of fact, I could make a specific finding merely stating that the leasehold under which they operate creates the relationship of lessor and lessee—period—and let it go at that. As it is, the instruments themselves have been set forth. We have differentiated the three types of instruments, and I draw the same conclusion as to them, contrary to your theory, that the [fol. 3426] relationship established by L-O stations was tantamount to ownership. But both in the opinion and in the findings the three types are treated separately.

It is only for the purpose of the ultimate conclusion that they are considered alike, and the opinion treated them as such. As a matter of fact, the facts, as was apparent at the end of the trial, and as the opinion makes clear, as to L-O stations the question was a question of law, ultimately, because the control was admitted. So all we had to find there is that legally that amounted to a lessor and lessee relationship for a definite term, and that, in my view, they

are just as much independent businessmen as were the Chevron stations the court considered in the Standard case. And that is all. That is why, that being a question of law, the only thing that is necessary for the purpose is to set forth the type of instrument, the standards, policies, and then the facts that for certain purposes, such as social security, income tax, employer's liability, and the like, these people are not considered as employees. That is more or less of a negative findings, but it is one that should be considered in conjunction with the wording of the lease. So that is my entire conclusion.

To illustrate, let's take your first objection to the definition of "independent operation," which appears under "B." That is merely a general statement which defines [fol. 3427] "independent operator" as the operator of a service station who operates said service station as an independent business enterprise and not as an employee or agent of Richfield. Nothing should be added to that. The objections raise again the theory of the defendant that there is no distinction between the two and, also, that service stations are not a legitimate market, which is a theory of the defendant which I have rejected. And if that were all, it might be argued that it is all-inclusive, but later on the three types of contracts are set forth specifically, the basic instruments which relate to them are set forth, so that it is not necessary in every one of these findings to counteract by giving the theory on which a contrary finding might be based.

And that is typical of the first group of objections, and "B" I have already indicated have no place here under any theory. That is my reaction to them, and I have studied them very carefully, ever since they were filed last Thursday or Friday, when they were lodged here. They were lodged the 27th.

Mr. Paradise: May I add one word to that, your Honor?

The Court: Yes.

Mr. Paradise: I am appreciative of the court's statement as to the fact that certain of the objections in the first group, and that is to say, the objections to particular findings,—that a portion of those may relate to the theory of the [fol. 3428] defendant as set forth during the trial.

However, there are included in this Group A Objections

to Specific Findings matters which are not a matter of theory, and are solely a matter of fact, and I should like to pick out the particular ones in that category and suggest that there is nothing in the record to support the proposed finding in that regard.

Not only is there no evidence to support it, but the evidence, the only evidence, is directly contrary to the findings, as proposed.

Now, while there are objections to several of that nature, the objections fall into rather a limited number of types. I refer particularly to all findings pertaining to the existence or nature of oral agreements or understandings between the defendant and any 3-C dealer or any 337 dealer.

Now, in making this explanation of the objections, I deliberately do not extend that objection to the L-O operator, because it may be perhaps a matter of language whether the oral discussions relating to the various conditions under which the L-O operators are permitted to operate the station are a matter of agreement or understanding, or a matter of condition. But when we limit this objection to the matter of the 337 dealer and the 3-C dealer, both of whom own or control their own station, and do not lease them from Richfield, then as to the suggested findings or conclusions per-
[fol. 3429] taining to the existence of an oral contract or agreement between the defendant, Richfield, and any of such dealers, I submit there is nothing in the record to support any such finding.

The Court: That is your conclusion, but I reached an entire- different conclusion. In other words, I realized that there was strength to your argument, and you will note that I referred to the fact in the opinion. I said that you had categorical denials from those in charge that no such instructions were given. I was satisfied, however, from the entire record that there was coercion, and, furthermore, there is this: If, as a matter of fact, these acts are sporadic acts, for which you have no responsibility, you cannot be harmed by any finding as to them. If they do not exist, you are not bothered.

Mr. Paradise: If the court please, there is no finding in the argument presented by the government that there was coercion. That isn't what they were complaining about. There was no problem of coercion. Here is the suggested

finding that there was an oral agreement and understanding at each of the 337 dealer and 3-C dealer stations. I am satisfied there is no such proof.

The Court: I am satisfied there is, or I wouldn't have made the statement. As a matter of fact, it gave me a great deal of concern. I worked awfully hard on it, and you gentlemen don't know how many hours and how many nights [fol. 3430] I spent on it. Sometimes I think I ought to keep cases under submission longer, because counsel think I work regular hours when I get them out. But you ought to ask the janitors around here or check the book at the entrance to the building, and you would find that sometimes I do not leave the court house at night. For instance, not so long ago I met one of the newspaper men on Saturday morning, and he asked, "What are you doing here on Saturday morning?"

I said, "This is still Friday for me." I hadn't left here on Friday. I was just coming out.

The opinion is the result of a lot of thought, and, as you are all informed, I have no assistance at all, because I have no law clerk. The only assistance I get is that occasionally I ask Mr. Childress to come in and help me wade through exhibits, and things like that, which he does very competently when I want to check my facts. And, of course, in all of these cases you have to find a general fact from sporadic incidents, because it would be impossible in a case of this character to produce evidence to show an actual conversation and agreement with anyone. Courts are not required to do that, and when you are satisfied that a pattern exists you can generalize. The rest is a matter of argument. You may argue to the higher court that perhaps the incidents were not numerous enough to warrant a finding, but that goes to the basis of the ultimate fact.

[fol. 3431] As I said before, from a practical standpoint you cannot be harmed by a general finding, if, as some of your witnesses claimed, there was no such coercion or agreement as to these two types of operators. So ultimately we are again confronted with the problem that I am not required to put into the findings facts which would invalidate my conclusion.

Mr. Paradise: Then, I take it the court would not be interested in further argument concerning that?

The Court: Oh, I have the entire morning for this. All of you gentlemen know me well enough not to be surprised at my technique. Instead of just letting you talk and then rule, I told you that I had read the objections, as I have indicated by the nature of my remarks, and that I do not think that the objections are well taken, and the only specific thing as to which there might be argument is some of the things you complain of in the decree.

If you have any other matter you want to call to my attention, I will give you my specific reaction to that. I am not trying to curtail your remarks. If you can point out any other matter on which you think there is room for—not a change of attitude, but for a change in the form of the finding to support the judgment, I will be glad to have you point it out.

Mr. Paradise: Well, as an additional illustration, then, if the court please, and I have forgotten at the moment [fol. 3432] the precise numbers of the objections which relate to this, but it is the findings with respect to the effect,—not the purpose of intention or the nature of the agreement, but the effect of this so-found oral agreement or understanding on the 337 and 3-C dealer.

The finding is made, and if the court will forgive me a short moment, I will find the precise findings.

First, I am looking at the last sentence of finding 26, the objection to which is contained in Defendant's Objection No. 39. The finding is made that:

> "The painting agreements and the oral agreements and understandings supplementing the same have had the intended effect of shutting out all competition for the petroleum products and automotive accessory business of the 337 independent service station operator."

Our objection is stated in Objection No. 39, that there is no evidence to support such a finding, and that the only evidence in the record is precisely to the contrary.

The Court: There, again, your objection is based upon your theory, which I did not adopt. Your theory was that these are straight painting contracts, and I hold, and I said that in plain language, they are merely a subterfuge to get control, because you are not in the business of painting service stations, and that they were a part of a scheme de-

[fol. 3433] vised—and I used the word not in a derogatory sense—apparently, not to comply with the Standard Oil decision, but to get around it. That is perfectly legitimate, just as the Supreme Court has said it is perfectly legitimate for any taxpayer to try all honorable and honest means to try to reduce his taxes, and that it is perfectly legitimate for any businessman to devise a practice which he thinks conforms to the law. But when confronted with a contract which speaks of painting, I had to put it in its proper perspective, and my conclusion was that it and the other were merely a devise so that control over the products that were sold there might be exercised. That finding was necessary in view of the conclusion that I reached, and I said in the opinion that this painting agreement, taken along with the minimum requirements contract, which is for 80 per cent of the actual requirements, all of that taken together, indicates that was the purpose.

So here again what you are objecting to is my conclusion. I am satisfied that the conclusion is correct, or I wouldn't have gone to the trouble to write an opinion. I could have called you in. In fact, I had a notion to do that, to just call you in, as I do at times, and just go on and talk for an hour and tell you what my conclusions are. I do that many a time in a complicated case, to save myself the trouble of writing a formal opinion. But I thought I indicated very [fol. 3434] clearly all of the fundamental legal problems that needed discussion, and when I started out I said to my secretary, "We are going to write a short opinion," and as it kept growing and growing, she said, "What do you mean by 'short'?" The first thing that gave her cause to remark was when I said, "I want you to use two books." Two books means a formal opinion, because she writes the text in one and the footnotes in the other, and whenever I do that, it is going to be a complicated matter. In a simple opinion we do not put the footnotes separate from the text, and we just throw them in. But I felt, in justice to the earnestness of your contention, that every one of these matters should be treated with, and I thought I treated them very fully, and expressed the basis for my conclusions.

Mr. Paradise: Now, as I understand your Honor's remarks, your statement concerns the findings that you have made as to the purpose of the adoption of the painting

agreement. However, the objection to which I am directing the court's attention is not as to the purpose, but as to the effect, and as to the effect, the evidence in this case, I should like to mention it is my sincere feeling, does not sustain the statement as to the effect.

Now, I am not talking about the statement of the purpose of the painting agreement, but as to the effect. There is no testimony—all of the government's competitive witnesses [fol. 3435] who testified testified with respect to competitors' efforts to sell in L-O stations. This finding to which I am not objecting pertains to the independent stations.

The Court: I am satisfied there is enough evidence to show that the effect was to shut out competition. As I found it, I had to make the finding. Otherwise there would be no violation of the law.

Mr. Paradise: I agree.

The Court: Thank you for your forthrightness. You see, I got an admission from you now that if I made this additional finding, I would have to turn my judgment around.

Mr. Paradise: That is not an admission, your Honor. I proclaim that.

The Court: That is all right.

Mr. Paradise: May I also mention to the court, before proceeding to our objections to the form of the decree, the particular objection No. 25. That is, I think, that the defendant is entitled to a true finding with respect to the 3-C contracts. The finding, as presented and as proposed, indicates that the form of requirements contract has been in effect during the period from 1945 to the date of the trial, which, of course, is not the fact, and is contrary to the stipulation of facts and is contrary to the undisputed evidence that the defendant changed all its contracts and, therefore, wrote another one immediately following your Honor's de- [fol. 3436] cision in the Standard Oil case, and that all of the contracts which were in existence at that time have been amended and modified to remove that feature of the agreement, with the exception of four.

Now, that is the undisputed fact, as well as the stipulation of fact, and the undisputed fact is also the reason for the defendant's change, which was a desire to comply with the laws announced by your Honor, and contrary to the findings as proposed by the government here.

The Court: I cannot see any objection to finding 14, because regardless of the terms, this tripartite set-up exists as of today, so that any change that may have been made is a question of argument. All that this said is that since that time a three-way arrangement exists as to these stations.

Mr. Dixon: They will exist for a specified term, which may be as long as 20 years in duration.

The Court: I can't see any objection to that specific finding.

Mr. Paradise: The objection, your Honor, I think is the reference to the fact that all of these arrangements which have been in use since 1945 to the present time are in particular exhibits, and, as the court knows, that is not true.

The Court: The reference to exhibits is merely a matter [fol. 3437] of illustration. It does not bind anyone to the particular exhibits. You might strike out the words "represented by plaintiff's exhibits" in one place or the other, but if you did that, you would have to search the record for the various forms. That can be done in an argument. It merely says that that exhibit is a representation of the form. I think Mr. Dixon used a very mild verb there, one that didn't tie it. He didn't say that is the exclusive form. He says that a sample of it is found in Exhibit So-and-so. That does not tie it. Otherwise he would have to give the various evolutions through which these forms may have gone, but that is all a question of argument.

Mr. Paradise: It may be a question of argument, your Honor, but the government knows that is the fact, and as I interpret the law on the significance of findings, the purpose of findings is for the facts, as found, to be available to the reviewing court, so that it does not have to search the record as to uncontradicted evidence.

The Court: It is not the object of findings to summarize the evidence in a case of this character. There are nearly 3,000 pages of record, and through Mr. Childress' famous scheme of subdividing, we never know the number of exhibits. I think your friend, Mr. Dwight Whitney, ought to be informed about this, because this hides the number of exhibits. It makes it impossible, unless you count them, to [fol. 3438] know exactly what you have. So I think the findings here have given the basic instruments, where they are necessary.

Now, when it comes to instruments, you want to bear this in mind, when it comes to findings. The interpretation that a trial court places upon a written instrument is not binding on the higher court unless there is evidence dehors the record, except they give us this sop, if I may use that word, they say if our interpretation is not unreasonable, they will not disturb it, but they determine whether it is unreasonable or not.

It is like telling us, as they do in a patent case, that a finding of patentability is a mixed question of law and fact. But I would like to see any decision in the last 20 years by the Supreme Court of the United States or by the Ninth Circuit where they have observed that rule. That falls down. I myself wrote an opinion in the Borax case for the Court of Appeals, and I pointed to the California law, which says that if the interpretation if not unreasonable, they will follow it. But they are not bound by our interpretation of a written contract. So that what I am always anxious about is this, and I have sought to avoid it in all cases, even when I have written the findings myself, as I have. In fact, in one of my best known cases I wrote the findings myself. That is the case of Brooks Brothers v. Brooks Clothing Company, where I deprived Brooks Clothing Company of the right [fol. 3439] to use the word "Brooks." It cost them $800,000 to buy the good will of Harris & Frank and to change the name for some fourteen stores, as a result of that opinion. In that particular case counsel were so far apart as to what should go into the findings, and I happened to be in Fresno, so I called in my secretary and I said, "I used to teach the subject. I want to see if I have forgotten how to write a complete set of findings."

I wrote a complete set of findings from beginning to end, and the judgment, and sent the signed findings with my compliments to counsel. That isn't the only case in which I have done it. I have done it in others. That was the most important case, and the highest compliment that the losing side paid me was that I didn't sink them in the findings. You know that expression, and I am very careful to see that the losing side is not sunk in the findings, because you can do that. You can do it very easily. I had a very simple matter recently, and merely to indicate the technique, and I am speaking of my own, because that is all I

know about, I don't know what other judges do,—I recently had a review, a bankruptcy review. I had reversed the referee, and as many a time happens with an expert, your bankruptcy experts don't know anything other than bankruptcy, and they don't know pleadings, just like patent lawyers don't know any law outside of that, most of them, anyway, and they don't know pleadings. They don't know [fol. 3440] how to phrase a pleading, if it is in any way different. So they brought me a modification of the findings approved as to form. But I wasn't satisfied with it, because they had failed to make a specific finding that I had set forth in the opinion that I wrote in the case. It is a very important case. It involved the question of fraudulent conveyance applied to a homestead, and I held that it did not, because you cannot defraud your creditor. In this case the homestead had been declared four years before, a perfectly good homestead, and then an attempt was made to convey the property to a daughter, and Judge Mathes had held that conveyance in fraud of creditors. Whereupon I held that revived the homestead, because the conveyance, even if it had not been set aside, would have had no effect on it, because you cannot be defrauded by having property as to which you have no rights put out of your reach. So it was very important to make a finding that the bankrupt had asserted her right in the bankruptcy proceeding, when she appeared in answer to the order to show cause that the trustee had caused to be issued quieting her title.

I wanted the upper court to know that I considered the answer, inexpert though it was, written without the aid of a lawyer, an assertion of her title, and in order to base on it the argument which I made in the opinion that there is no time limit as to when the right to exempt property may be [fol. 3441] asserted, and so long as the proceeding was pending and the woman was in the penitentiary, anyway, there was no such thing as a waiver on her part. It wasn't there. So I took the last two pages and I put in a specific finding to that effect, and then sent that to the attorneys.

I am trying to give you that as an illustration of how careful I try to be in these matters, to see that the factual basis for the decision is before the Appellate Court, and more than that is not right or proper to put in. I think these findings are a little too long. As a matter of fact, I

didn't think it was necessary to put in as many of the instruments as are in it.

Mr. Paradise: Now, then, without regard to any of the objections to the proposed findings, or objections based upon failure to find, which your Honor has indicated you didn't want to hear any further statements on,——

The Court: What I am doing now is indicating to you specifically my special reasons for feeling that the specific objection which you pointed out is not valid. I have already indicated generally in the discussion why I disagree with the entire theory of the objections. You have pointed out finding 14, and I have tried to indicate to you that it is a correct finding, that it does not tie you to the particular exhibit, and said it was represented by that. You can show that it was gone through various forms. You have that [fol. 3442] argument. If the argument helps you, why, you are welcome to it. He has not foreclosed you. That is why I say that. He has not foreclosed you by the way he has worded it. He said, "Illustrative of," and he said, "As illustrated by."

I like that word "illustrative." You will notice in my opinions that I use it a good deal. I like it. It is a practical method of pointing to some specific thing as illustrating what you are talking about, and giving a specific example is very helpful. And that is all he says, that in that finding the particular exhibit is illustrative. He does not strike out your other exhibits. Your other exhibits are in. One thing that I did in this case, and I did it also in the Standard case, I did not exclude any facts which lend themselves to your argument, even though I did not think they warranted the particular inference that you wanted to draw.

So you have all the data relating to the amount of money. In fact, I used one of your summaries, but I get mixed up on figures. I am not very good at figures, and my secretary, Mrs. Hicks, will not mind if I say she is not either, and that is one thing that we are caught with occasionally in these opinions involving figures. Dropping $100,000 or a million gallons means nothing in our young lives. They just fall off.

So Mr. Dixon has called my attention to some of the [fol. 3443] errors in the figures, and I have a list of those, which I am holding to make the correction on the proof

when it reaches me. But I even put in the millions of dollars you had spent and had invested in these stations, so that the facts are there. I do not think they call for a different result, but if the Supreme Court should want to consider that, the facts are there.

It is not necessary to put them in as you seek to do by your group of objections designated as B. The facts are in the record, and they can be used, and if the court wants to differentiate, and if they want to do another Columbia Steel case, it is all right with me. In the Columbia Steel case they did a lot of differentiating. Except perhaps for Professor Toulin who is a very partisan writer, and who starts out by saying he is going to give "heck" to all the courts because they misinterpreted the law, I don't think any writer thinks that the Columbia Steel case is anything but one of those unusual things that sometimes happen, and that if the courts want to do something about it, they will stress the law later on.

Now, the facts you refer to are in the record, but they have no place in the findings because they would warrant inferences contrary to the findings, and a set of findings should be consistent. They should not contain contradictory facts, even though the contradictory facts are in the record. [fol. 3444] Mark you, I am not saying except as to inferences that these specific facts that you refer to are not facts in the record. They are there. I considered them either immaterial or I drew an inference from other facts contrary to them. They have no place in my findings.

If they invalidate the findings, that is a consequence that any judge must face, and there is nothing in these findings that prohibits you from arguing the full force and effect of any of these facts, which either are undisputed, as you claim, or warrant a different inference than the inference which I have drawn.

Now, if you have another one that is illustrative, why, all right. If not, we will go to the decree.

Mr. Paradise: The objections with regard to the decree are made in part III of the objections, and I will not proceed to argue orally any of those except those in which the court indicates it is interested.

The Court: Just a moment. Objections 1 to 5 are not well taken because there they merely carry out the general

objection which was contained in the objections to findings. The first one as to which any question has arisen in my mind is as to paragraph VI. I do not read it the way you do.

Mr. Paradise: That is paragraph VI of the judgment?

The Court: Yes. It is objection 5 on page 36 of your objections. I think you are too worried about that language. [fol. 3445] The language of an injunction must be positive. Then the suspension clause which I put in, as I did in the Standard case, the moment you appeal will stay the effect of all of this.

Mr. Paradise: I was wondering if you were talking about paragraph VIII, which is the stay. We had objections to both paragraphs VI and VIII, but for entirely different reasons.

The Court: What is that? Just a minute. Yes, I guess I was looking at the wrong page. I had in mind VIII. Let's get back to VI, then, because that may warrant some discussion.

I cannot see any objection there. The Supreme Court has repeatedly held that where a practice is condemned under the antitrust laws, the court, in order to assure the enforcement of the decree, may police it. And all I have said here is that the 24-hour clause is declared invalid, and the cancellation clause can be used only for breach of the covenants in the lease, and that they request a copy of such cancellation, as an assurance of policing, as it were.

Mr. Paradise: Well, doesn't it go far beyond that, your Honor, in this respect:

The first sentence of that paragraph invalidates the 24-hour clause, and states that the 542 form of lease cannot be terminated on less than 30 days' notice.

We objected to that both in the conclusions, as well as in the judgment, on the ground that that is beyond the juris- [fol. 3446] diction of this court, under the State law.

The Court: No. I have a right to do that. I have a right, as a part of the equity powers, to declare that those leases are 30-day leases, at least.

Mr. Paradise: I understand your Honor's ruling on that, but——

The Court: And that is what this decides, and the provision for policing is legitimate. You gentlemen should

look at the decree that I have been wrestling with in the last case, since you left.

Incidentally, I lost all the time that I gained in your case in this other case, because it ran way beyond what I expected it to take. So you see, gentlemen, that any gain in time does not enable me to play golf. It merely means I have to give it to another case. But you ought to see the provisions the government put into the Paramount decree. In fact, the Supreme Court not only allowed them, but they even suggested more. In the first place, the question of due process does not enter into antitrust, because the antitrust laws are passed under the plenary power of Congress to regulate commerce, and it has been stated that the due process clause does not even apply. I do not go to that extent, and I think I have either in your opinion, or in the opinion I am writing now, pointed to the fact that when it [fol. 3447] comes to due process, all that it means is this: that in view of the fact that the Congress of the United States can actually exclude entirely a product from commerce, then the question of due process loses its entire significance, because if you can exclude a product, you can regulate it to death, as it were. So the court, in upholding the law, can invalidate contracts, because it says so in so many words.

Mr. Paradise: Perhaps I haven't made my objection clear. My statement concerning the 30-day clause was merely in an analysis of paragraph VI. The point of this particular objection under objection 5 relates most particularly to the second sentence of paragraph VI, which your Honor has before you and which has this effect: it states that the lease cannot be terminated except for a breach of the written covenants contained in the written lease. That is the 542 form.

Now, as your Honor will recall from the evidence, there are a multitude of matters discussed and told to the operator before he is permitted to occupy the premises. There are matters of hours of operation. There are matters of the wearing of uniforms. There are matters of his dealing with the public, and his following Richfield's procedures and practices with regard to the servicing of cars, and a multitude of things over and above, and including the matter of exclusive dealing.

Now, the only thing that is contained in the written [fol. 3448] lease,—there are only two effective covenants in the written lease, effective for practical purposes. One is a provision for the payment of rent, and the second is a provision for the maintenance of the property. The government's form of the decree,—and I draw your attention to the time of the argument, at which time the court told me not to worry about the form of the written decree, but I am worrying now. The government states in this paragraph of the judgment that that written lease can only be terminated for a breach of the provisions of the written lease, and, as I say, there are only two effective provisions. The court will also recall the undisputed evidence that this property is leased to this operator at less than its fair rental value.

What is the effect of the decree proposed by the government?

Mindful of the fact there is no duration, no stated term to the 542 form, and as the government states in one of its findings it has unlimited duration, which means it goes on forever until terminated by 24 hours' notice, which either side can give, the effect of this provision is that so long as this L-O operator is in there and paying the rent called for in the lease, which is two-thirds of the fair rental value and not more than that, and two-thirds of what Richfield is paying to the property owner and not more than that in those situations where Richfield is leasing the [fol. 3449] property, this particular man can hold the property forever, whether he sells Richfield gasoline or not. I say that is more strenuous than any divestiture decree that any court has framed in any antitrust case, even where conspiracy exists.

The Court: I think you are undul- apprehensive, and I cannot see how this situation which you envisage can arise. In the first place, I have found that there were oral understandings which were illegal. Now, the only thing the government is concerned with is the illegal undertakings. We do not by the findings or by this decree determine that you cannot discharge the man, say, on the ground that his deportment is bad. The object of this law suit is merely to put an end to conditions which are violative of the law, and I think you are much better off with the form in there than

if he had put the words of the opinion in there, that you would like him to put in. At times it may be advisable to put language of an opinion in findings, but an opinion is an argument, a rationalization of the court's conclusions, and the language of the opinion may not always be appropriate in a decree. I cannot see that this would affect in any manner any right that you may have. If you should give notice that, "You are conducting a filthy station," or "You don't look so good on the job," or "You are not clean," and so forth, "and for this reason I terminate this station," I do not think that anybody could contend that you cannot do [fol. 3450] that under this decree.

Mr. Paradise: I take it your Honor agrees that should this decree be entered that a termination of that sort would be perfectly legal and not a violation of the decree?

The Court: Certainly. The only violations we are concerned with are violations of the antitrust laws, and the only conditions over which we have control are those. The only object of the finding as to the nature of the decree is to see that the termination clause, as it presently exists, is not made a device to cover up the forbidden practices.

Mr. Paradise: Yes, but doesn't the language, your Honor, read fairly and reasonably, go tremendously further than that? It says that the 30-day cancellation privileges,—mind you, the lease calls for 24 hours' notice, and it calls for the exercise to be made by either party at any time for any cause whatsoever, and is not limited to any particular cause, and is terminable without cause, if your Honor please. But this paragraph of the decree says this, "Such 30-day cancellation privilege"—which the government has invented for the benefit of the defendant, and it isn't in the lease—"may be exercised"——

The Court: I invented that. That was my brainchild. I invented that.

Mr. Paradise: (Continuing)—"may be exercised by defendant"—and from here on is the language criticized—[fol. 3451] "only for a breach of any of the written covenants contained in any written lease . . . "

The written covenants, as I pointed out, are the payment of the rent and the maintenance of the property.

The Court: Let's pass to another one. I will hear from

Mr. Dixon on that. Let's have the other one, and then I will hear from him.

Mr. Paradise: Now, we object——

The Court: We are talking about VI now?

Mr. Paradise: Yes. We think that the last sentence of the provision is unreasonable, but I will pass that, your Honor, and to get to the much more important objection, that is, to the concluding clause of paragraph VIII, which puts into effect immediately and notwithstanding any appeal all of the restrictive injunctive provisions of paragraph VI, which we understand is contrary to your Honor's decision.

The Court: That is VIII?

Mr. Paradise: Yes. And I am referring to the defendant's objection No. 7, which pertains to paragraph VIII of the judgment.

The Court: Well, I will hear from Mr. Dixon on that. I wasn't quite sure what he meant by that. There might seem to be a contradiction of language. Maybe he can explain that. Let's go to the next one.

I think that is about all. You don't like the judgment. [fol. 3452] I know you don't. This is off the record.

(Statement off the record.)

The Court: I think those are the only ones, unless you have some others that do not look serious.

Mr. Paradise: May I add a word concerning the concluding objection, No. 9. The government has asserted throughout this litigation that the issues are determinative by the Standard Oil decision, which we have disputed. Nevertheless, if that is the conclusion of this court, we feel that the judgment should not be more onerous than was the judgment in the case of the Standard Oil Company.

The Court: That is that clause in there. Yes, I will hear Mr. Dixon on that. There are those three matters. I notice that Mr. Dixon has the record in the Standard case, so we don't need to send for it.

Mr. Dixon: I wondered if your Honor wanted to give the reporter a recess before I start.

The Court: Yes. We will have a short recess.

(A short recess was taken.)

The Court: All right.

Mr. Dixon: May it please the court: I will direct my argument and comments solely to paragraphs VI and VIII of the proposed decree, and will comment upon the objection made by the defendant with reference to a part of the language of paragraph IX of the proposed decree.

[fol. 3453] The Court: There is one thought occurred to me during the recess. I had not thought of it before, but in going back, I am trying to think of the reason for putting that in, and, if I remember correctly, it is caused by the fact that unlike Richfield in this case, Standard did not admit the existence of this absolute exclusive dealership, so far as the Chevron stations are concerned. For that reason, and to protect them against possible prohibition of any split-pump policy, I think this was put in. I can't definitely remember how that got in there. Do you remember whether it was in the original, or whether it was put in at their request?

Mr. Dixon: You are speaking now——

The Court: Of No. IX.

Mr. Dixon: Of No. IX. This No. IX is a standard form, as your Honor suggested, of a policing provision, which is inserted in all consent decrees, and is offered by the government in all their judgments which are submitted and filed for the court to consider.

The purpose of the provision, which the defendant complains against in paragraph IX, is solely to police the judgment. It was not in the Standard decree, the Standard decree being limited, insofar as that language is concerned, to the part commencing with the language for the enforcement of the judgment, and from there on.

In other words, the only difference between this language [fol. 3454] and the language of the Standard decree is that it requires the defendant, upon the request of the Attorney General, to submit reports to the Attorney General concerning any matter necessary or related to the enforcement of the judgment itself.

The Court: That is all right. That isn't the point I have.

Mr. Dixon: I am sorry, your Honor.

The Court: The negative clause that they say was in the decree, the last paragraph. I am starting backwards. They have included paragraph IX of the Standard decree.

Mr. Dixon: Oh, I beg your pardon, your Honor. Yes.
The Court: And are seeking a similar clause——
Mr. Dixon: Oh, yes.
The Court: —merely that it shall not—
Mr. Dixon: I confused the government's proposed IX.
The Court: No, the one they got from the decree.
Mr. Dixon: Yes. That was contained in the judgment, your Honor, principally because of the existence in the Standard decree and in that case of the so-called TBA dealer type of contract, which in substance is not before the court in this case.

Your Honor will recall that under that type of contract Standard, in effect, loaned the dealer certain equipment, consisting principally of receptacles for the deposit of their [fol. 3455] oil, and their petroleum products, and other types of equipment, which bore the name of the Standard Oil Company, and description of its product contained in those receptacles or containers.

Now, in the instant case the Richfield Oil Company does not furnish, insofar as the record in this case is concerned, that type of equipment to any of the dealers that are being considered, insofar as the arrangements between such dealers and Richfield are concerned in this case. In other words, there is no bailment or loan of any Richfield equipment here to any of the so-called L-O, 3-C or 337 types of dealer, and for that reason this provision in paragraph IX, as suggested by Richfield, was not inserted in the decree which the government submitted for your consideration here.

The Court: All right. We will go back to No. VI and VIII. No. VI.

Mr. Dixon: Now, before I cover in detail the provisions of paragraph VI of the proposed judgment, I wish to state to the court, because it shows the difference between what the government is suggesting in paragraph VI, and what the government is asking for in the case which is pending against the Sun Oil Company in the District Court for the Eastern District of Pennsylvania, which suit was filed on January 12, 1950, and which involves, in substance, exclusive dealing type of arrangements between the Sun Oil Company [fol. 3456] and its dealers. In that complaint the government asked, as a part of the prayer for relief, in paragraph VI thereof, that the Sun Oil Company, the defendant, be

ordered to include in all existing and future leases of service stations operated by independent service station operators provisions for (a) a term of not less than five years; (b) a right of lessee to freely assign or transfer the lease to an independent service station operator of his own choosing; (c) a limitation of the right of the defendant Sun to cancel during the term for a breach of the reasonable covenants, such as illegal use, waste, abandonment of the premises, and for non-payment of rent; and (d) a written notice of not less than ninety days of cancellation to lessee.

In other words, in the case against the Sun Oil Company the purpose of paragraph VI of the prayer for relief was to make certain that the lessees operating under the various types of arrangements in that case could not be canceled out of their lease without there was a violation of the written covenants of the lease, and that written notice of intention to cancel such leases be given not less than ninety days prior to the actual cancellation covenant. And that, furthermore, in future leases, and even as to those leases which were then and now in existence, that the lessee be given the right to assign his interests in the lease to another operator, and that the term of the lease as to future leases be for a term [fol. 3457] of not less than five years or duration.

I have gone into that merely to indicate that in this type of case, of course, the purpose of the action is to remove the alleged illegal restraint which the government feels has been imposed upon a substantial market for petroleum products and automotive accessories, and that in order to remove that restraint it is necessary that the rights of the dealer or the independent businessman occupying these premises be protected against cancellation of his right, as lessee, for anything other than a valid reason for his cancellation, as exists in the lease itself.

Now, coming down to the instant case, paragraphs VI and VIII deal principally—at least a part of VIII—deal entirely with the L-O operator. Your Honor, of course, has found and knows what that arrangement is. There is a written form of lease which contains certain covenants against waste, and so forth, of the property that is turned over to the dealer or independent businessman lessee.

Now, the evidence in this case, insofar as it related to the tenure or length of term of the lessee under this type of

arrangement was that it went on almost indefinitely, as long as the operator complied with the policies represented, in substance, by the exclusive dealing type of arrangement of the defendant. In other words, as your Honor has found, that cancellation privilege was never resorted to,—there is [fol. 3458] no evidence it has been resorted to at any time for the violation of any of the written provisions of the lease itself, but generally to enforce the illegal arrangement, that is, the exclusive dealing arrangement that has been found illegal by your Honor.

Now, in order to secure effective relief under those circumstances, the government submits that the dealer who is now in possession of the L-O type of station under the lease, a written form of lease, must be protected against any exercise of the 24-hour cancellation clause from the time of the entry of this judgment; and, second, that he should be protected against any cancellation of his right of possession by Richfield for any alleged reason, which may be in fact a reason which is being used to or given to enforce the illegal arrangement.

In other words, the purpose of paragraph VI is to assure effective relief insofar as the dealer market is concerned on the L-O type of station here, as well as the others, of any cancellation of his right to possession for any reason which may bear in any way upon the illegal part of the agreement, which the defendant has been found guilty of entering into.

The Court: Doesn't that give them the immediate benefit of a decree which is not final?

Mr. Dixon: No.

[fol. 3459] The Court: But your clause VIII and VI go together.

Mr. Dixon: That is right.

The Court: But doesn't that, by giving it effect now, mean you are practically limiting the scope of the decree by forbidding at the present time a breach for conditions other than those in the written lease?

Mr. Dixon: Let us assume that paragraph VI and VIII go into effect, your Honor. What would happen, as the government interprets those provisions, would be that from the time the decree was entered and signed by your Honor that the defendant would be prevented from exercising the

24-hour cancellation clause contained in its present lease, for any reason except a violation by the dealer of the written covenants of that lease.

The Court: Yes, I understand that. But you are giving it the effect of a judgment. You are giving immediate effect to a portion of a judgment which has not become final.

Mr. Dixon: That is right, your Honor.

The Court: And an injunction of this character, unless you stay it, takes effect immediately, and the object of the stay is to allow a reasonable time for the benefit of an appeal. I am willing to maintain the status quo, if it can be done, but you are practically saying now to all these lessees: From now on you are working under a contract which has a 30-day limitation and requires notice, and it cannot be terminated.

[fol. 3460] Is it fair to the defendant to do that? It is not an appeal that he can stay by putting up a bond, under the law. The only way of not robbing the defendant of the right to appeal is to stay it.

You will remember I brought that in, and you will remember when we discussed it, it was a case of the judge telling the lawyers where the law was, and they wondered where I got it, and I showed them there was support for it in a decision of the Supreme Court of the United States. It is a very famous California case, a California water case, the Lindsay-Strathmore Irrigation District case, which, by the way, was tried by Judge Albert Lee Stephens when he was a judge of the Superior Court, in which the Supreme Court went to the law as it existed in England to determine whether you can stay the effect of a mandatory injunction that you yourself had issued.

So there is legal basis for doing it, but we are talking now of the practical effect. It would seem to me that we should not, as of today, change the contract, or if we do it at all, do not put in any way, and make them go to the Supreme Court and let them stay it, which is the only other alternative. But if we agree on principle, and I am satisfied on principle, that this is the proper way of handling it, and we did it in the other case, I do not see why we should put any part of the decree in effect at the present time.

[fol. 3461] Mr. Dixon: The difference between this case and the Standard case, from that point of view, your Honor,

is that the Standard case did not involve or contain in any of its leases or arrangements this 24-hour cancellation provision.

The Court: Regardless of that, I am pointing to the fact that if in an equity case, where you issue a decree of injunction, you do not stay it,—well, take the Lindsay-Strathmore Irrigation District case. That was a case where they held that the irrigation district had certain water rights against certain owners, and that was before the new doctrine had arisen, that a governmental body could not go to court without having a congressional Act behind them. At that time it was still proper for a governmental body to bring private owners into court and say, "Look. I have these rights, and I want them."

Now, after the court had held that they were entitled to those rights, they issued an injunction to prevent the defendant from diverting the water. Now, had they not stayed the effect of that injunction, an appeal would have been a futile act, because if they had not stopped them from diverting the water as of the date of the decree, it would not make much difference what would happen to the decree in the higher court.

So I am inclined to think that if the decree is stayed at all, it should be stayed as to all its clauses, and that [fol. 3462] can be done by putting a period after the word "determined," and then striking out the last three lines there.

If it were merely a case of maintaining the status quo, I could see the strength of your argument, but it is doing more. In other words, prior to the decree you are giving to the L-O operators the benefit of a termination clause, to which the higher court may say they are not entitled. In other words, you are extending the period as of today.

I am still satisfied that I interpreted the law correctly, and it is a very mild policing, and I am glad you called my attention to the other matter. I wasn't aware of some of the prayers in other cases, but I was familiar with what the courts have done by way of policing in the motion picture cases, and they are pretty drastic. So I feel that the interpretation of the contract was correct, and placing that clause in there is in accord with what I think the view of the courts would be as to the entire purpose of the instrument, because

if it is inconsistent, if the termination clause is inconsistent with the habendum clause, by all rules of interpretation the habendum clause would prevail, but there would be two clauses. Certainly, our system does not favor tenancies at will, terminable on a notice which is less than the rent reserve.

I could have given you a hundred cases on the subject.

The more I studied it, the more I found. In fact, the courts of California especially have gone very far in turning [fol. 3463] any of these tenancies at will into tenancies for a definite period, whenever they had the chance to do so. So I do not want to detract from the strength of my ruling, but I still do not see why we should give them the benefit of that at the present time.

Mr. Dixon: Your Honor, if this was the Standard case, where there was perhaps a question of determining for the first time the legality of this type of arrangement, the government would feel that the defendant should be given a full opportunity to have the final legality of that type of arrangement determined by the Supreme Court, and that a full stay in every sense of the term, in fairness to the defendant, of any order that the court might enter would be proper.

The government feels that that is not the situation in the instant case. This case was filed shortly after, as your Honor knows, the Standard Oil decision, but did not reach a trial and a judgment until about three years after the Supreme Court had finally decided the Standard case.

The Court: Let the record show that I was not to blame for that. As soon as it got into my court, I had you before me, and we set a date for trial.

Mr. Dixon: The case has certainly been expeditiously disposed of since it has been in your Honor's court.

The Court: We will all take the compliment, gentlemen. We deserve it.

[fol. 3464] Mr. Dixon: We are very grateful for the prompt consideration which your Honor has given this case, but I do feel that the legality, or, rather, the illegality of the practices complained of here have been and were thoroughly established by the Standard decision. Therefore, we have an adjudication, in substance, of the same question

three years after a final determination of that question by the Supreme Court in the Standard case.

Now, the government is not asking in paragraph VI that the provisions of this decree become immediately applicable upon signing without any stay. The government is asking in paragraph VI and paragraph VIII, when read in connection with VI, that one of the devices or the means or methods used by the defendant to effect what this court has found to be an illegal restraint under both the Sherman Act and the Clayton Act be taken away from the defendant insofar as exercising that 24-hour clause is concerned, as of the date of the entry of this decree.

Now, I do not feel that that is unreasonable and that it will impose any undue hardship upon the defendant in this case, but it will serve to protect the L-O dealer from any exercise of that clause by the defendant without any reason whatsoever, which it can do if this provision in paragraph VI and VIII is not in the decree while this case is on its way up to another determination of the same question, in [fol. 3465] substance, which we feel the Supreme Court decided in the Standard case. And that is the purpose of paragraph VI and paragraph VIII, to make certain in a sense, your Honor, that the status quo will be maintained insofar as the dealer is concerned, except that he is not going to be subjected during this appeal without any reason whatsoever to a 24-hour cancellation clause, which your Honor has found to be illegal and a device, and certainly has been resorted to to enforce the illegal restraint. And that is the reason why we have asked as to the 24-hour clause—I mean the injunction against using that, that it go into effect upon the signing of the order, and we feel that it is reasonable, we feel that it is in a sense necessary if the status quo insofar as the dealer pending the appeal is to be maintained, and is his right to protection. And while we are not here arguing the dealer's case, we do think that they are entitled as a group to be protected from this clause, or the exercise of it, during this appeal.

Now, if counsel are willing to stipulate that they will notify counsel for the government when they exercise that provision pending appeal, that might be satisfactory, but the government feels that the public interest here, as represented by the 1300 or more dealers who are subject to this

24-hour cancellation arrangement, should be given some protection pending this appeal from the exercise of that provision. As I say, we do not feel that it is going to impose [fol. 3466] any burden on the defendant here. We do feel that it will be of considerable value in a sense to the dealer, to protect him perhaps from cancellation of his lease. Some of the dealers testified here, as your Honor knows, and are still under that arrangement. I am not in any sense of the term suggesting that the defendant would cancel out those dealers for the reason that they testified in this case in favor of the government, but I think that on a broad basis this 24-hour provision, which the evidence shows has been used, and without which they obviously could not have so vigorously enforced this illegal arrangement, should at least be suspended in its operation pending the final determination of this case on appeal.

The Court: Are you afraid of reprisals?

Mr. Dixon: What is that?

The Court: Are you afraid of reprisals?

Mr. Dixon: That is a possibility, or the defendant could, of course, immediately, I assume, proceed to cancel out any number of these dealers that it might want to cancel out, and if they are not going to do that, then where are they hurt by this provision?

The Court: I hadn't given that phase of the subject any thought.

Mr. Dixon: That is the sole and only purpose of this provision, your Honor, and the reason why it is suggested in this case and not in the Standard case is because the 24-[fol. 3467] hour cancellation clause was a very vital part of this case, insofar as enforcing the illegal arrangement is concerned.

The Court: I had no thought in suggesting it in the decision, except the general thought that in any matter of this character it should be done. We talked about the Brooks case. That was a mandatory injunction, and had I not suspended the effect of the decree, they would have been compelled to do what they didn't have to do until two years afterwards. As a matter of fact, I only gave them 90 days, and it was extended because they had to get a new name, and they finally decided that rather than have a new name for fourteen stores, if they bought an established business it

might pay, and it did. So, as I say, that was my general thought.

Mr. Dixon: I might add this, if your Honor please, that it was the hope and thought of the government that with the decision in the Standard case, as to many of the practices, some of which have been presented to your Honor in this case, which are resorted to by some of the companies or individuals engaged in business, they would see fit to apply that decision or ruling to the practices that they were then resorting to.

It appears, however, that it may be necessary in every case to attack each practice. In other words, as your Honor knows, in substance at least, the government contends there was no real difference between the arrangement in this case and the one that was adjudged illegal in the Standard case. [fol.3468] But if the government is going to have to attack each company, and they are entitled, naturally, to their day in court, to have the legality of those practices determined case by case, of course there is no other alternative except to resort to that procedure, but the government feels that where the law has been established, as we feel it has been and was by your Honor in the Standard case, that they should not be entitled after an adjudication to a further suspension of the judgment except on the order of the Supreme Court itself. The government has not gone that far in this case. It is merely asking in paragraphs VI and VIII that a device, which has admittedly been used to enforce this illegal restraint, be enjoined in its use pending the final decision of the Supreme Court on that question.

The Court: All right. Is there anything you want to add, Mr. Paradise?

Mr. Paradise: Yes, your Honor, because I think this is the most important phase of this litigation. Does the court want it now, or after the recess?

The Court: No, I want to finish it now.

Mr. Paradise: All right.

The Court: I have other things to do, gentlemen. I have to select a grand jury for the next term at 1:00 o'clock, and I have a lot of other things. I am about to acquire new duties, in addition to my trial work.

[fol. 3469] Mr. Paradise: I congratulate you.

The Court: So I have to become prepared for them.

Mr. Paradise: I will confine this to the three parts attacked by the government, and under consideration by the court, and in the order the court suggested, I will take the last one first, the inclusion of that exception which was contained in the Standard case. I say this, and I do not intend rancor, but I feel that a good many statements of the government are sheer double talk in this matter. When it serves its purpose to say this case is the same as the Standard case, it does so. When it serves its purpose to say it is different, it does so. I don't know which is intended and which is the fact.

It is true, there is no so-called TBA agreement as there was in the Standard case, but I can't see from any plain reading of paragraph IX, which is in the Standard case, that it was based upon the existence of the so-called TBA agreement.

In this case we do not have a TBA agreement. We have a form 542, and the effect of these provisions may or may not be the same, but I say if this case is to be governed by the decision in the Standard Oil case, this defendant is entitled to a decree no more onerous.

Now, Mr. Dixon states there is no showing in this case that Richfield has furnished any receptacles or pumps with the Richfield name. What do we have in the L-O station [fol. 3470] but that very precise and actual thing, the furnishing not only of the pumps and receptacles, but the furnishing of the entire station, which necessarily includes the pumps and receptacles. And every one of the pumps is plainly marked with a decalcomania showing the Richfield brand and the Richfield name. I say it is entitled to the same saving clause as was therein contained.

Now, unless the court desires further discussion regarding that, I would like to go to paragraphs VI and VIII of the decree.

As to the nature of the injunction in paragraph VI, it is my feeling that the government has not answered the contention I made during my original remarks, and as to which I understood that the court agreed with me, and that was that this paragraph VI, although the language might appear strenuous, would not be interpreted as it is written, and would not be interpreted to provide that the defendant be enjoined from terminating any L-O lease except for an anti-

trust violation. The decree, of course, goes far beyond the question of any antitrust violation. It says that Richfield may not terminate except on 30 days' notice, and then only if there is a violation of any of the provisions of the written covenants of the lease, which provide for payment of two-thirds of the fair rental value to the defendant, and which provide for maintenance of the property without waste. [fol. 3471] That I submit is complete confiscation of property, and goes far beyond any divestiture decree under which any defendant would be entitled to get the fair value of the property of which he had to divest himself. But no decree in any antitrust case to which the government can point, unless I am most radically mistaken, has ever provided for divestiture in a situation of a technical restraint of trade, such as is here charged and here found.

We have no monopoly. We have no conspiracy. Nothing but a technical restraint under Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Now, third, as to the saving clause, or, I mean as to the effectiveness of the decree, and the stay.

Mr. Dixon has suggested that the purpose of the qualification to the stay is that the defendant not exercise the 24-hour clause. But if one will look at the provision, the literal language of paragraph VIII of the proposed decree, it does not apply just to the first sentence of paragraph VI, which is the 24-hour clause. It says that for the entire provisions of paragraph VI the judgment is stayed. In other words, nothing in paragraph VI is stayed, which means that the defendant, as soon as this decree is signed, not only cannot use a 24-hour termination clause, but, further, it can't use a 30-day clause except for a proven violation of the written provisions of the lease.

Now, the government's ostensible reason for a decree [fols. 3472-3473] that drastic is that the defendant might use a valid termination clause, even one valid within the boundaries of this decision, a 30-day clause,—we might use it for improper purposes. I would submit that would be subject to proof, if that were true. Why do they need a provision, since they take away our property, that is to say, continue this lease indefinitely, or for all time, at two-thirds of its fair rental value, and without regard to the contract made between the parties.

The Court: All right.

Mr. Dixon: If the court please, I want to correct the record. I noticed that I referred to the Standard agreement as a TBA agreement. I find I am in error, and may the record show I was referring to the petroleum products and equipment agreement, which provides for the loan of it, and paragraph 4 reads as follows:

> "As additional consideration for dealer's execution of this agreement, company agrees to install the equipment and facilities listed below, title to such equipment and facilities to remain in Company."

The Court: All right, gentlemen. Thank you very much. I will think the matter over, and you will hear from the clerk. If I require any changes to be made that cannot be made by deletion, you will be informed to that effect. If I decide to sign without change, you will get the proper notice.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil Action No. 6896-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICHFIELD OIL CORPORATION,

Defendant.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, as amended, defendant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction upon appeal to review the final judgment of the District Court entered in this cause on August 2, 1951. A petition for appeal is presented to the District Court herewith, to wit, on September 4, 1951.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by § 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 15 U. S. C. A. 29).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal

in this cause: *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208; 83 L. ed. 610; *United States* v. *Crescent Amusement Co.,* 323 U. S. 173; 89 L. ed. 160; *Associated Press* v. *United States,* 326 U. S. 1; 89 L. ed. 2013; *United States* v. *Yellow Cab Company,* 338 U. S. 338; 94 L. ed. 150.

Statutes Involved

The pertinent provisions of § 1 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. A. 1), commonly known as the Sherman Act, are as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ."

§ 3 of the Act of October 15, 1914, as amended (38 Stat. 731, 15 U. S. C. A. 14), commonly known as the Clayton Act, is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

The Nature of the Case and the Ruling

This is a suit in equity brought by the United States in the District Court for the Southern District of California, Central Division, charging that defendant Richfield Oil Corporation (herein called "Richfield") was and is violating § 1 of the Sherman Act and § 3 of the Clayton Act.

The case involves three entirely separate and distinct types of service stations:[1] (1) *L. O. ("Leased Out") stations,* which are service stations owned by Richfield or leased by Richfield from a party other than the operator thereof and thereafter leased by Richfield to an operator under a written lease agreement for an indefinite period of time, subject to termination by either Richfield or the L. O. operator on 24-hours' notice. (2) *Dealer stations —337* which are owned by the 337 dealer or leased by him from a lessor other than Richfield. Richfield has entered into written sales agreements covering petroleum products with each of the 337 dealers, and in some instances Richfield and certain 337 dealers have entered into written Painting Agreements providing for the painting by Richfield of their stations. (3) *Dealer stations—3-C,* which are owned by the 3-C dealer or leased by him from a lessor other than Richfield. Here, in addition to a written sales contract with Richfield, the 3-C dealer has leased his station to Richfield and has taken a sub-lease back, both on Richfield's printed forms.

In support of its charge, plaintiff alleged the following: that Richfield had entered into contracts "consisting of written and oral agreements and understandings" between itself and "independent service station operators" in

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[1] The distinction between the three types of service stations has been recognized in the pleadings and throughout the trial and in the Opinion of the District Judge filed July 2, 1951, and in the Findings of Fact, Conclusions of Law and in the Final Judgment made and entered on August 2, 1951.

the States of California, Oregon, Washington, Nevada, Idaho and Arizona; that the written agreements consisted of written service station leases, sales contracts and painting agreements; and that the written agreements had been modified and supplemented by oral contracts, agreements and understandings between Richfield and the independent service station operators which specify and restrict the brands of petroleum products and automotive accessories that may be used by or sold at such service stations. It was alleged that these contracts unreasonably restrained and substantially lessened competition in interstate trade and commerce in petroleum products and automotive accessories.

The complaint did not charge a monopoly or attempt at monopoly by Richfield in any line of commerce. The complaint did not charge any conspiracy or combination.

With respect to the *L. O. stations,* Richfield denied in its Amendment to Answer that the L. O. operators are "independent" service station operators under the facts and circumstances admitted and alleged therein. Richfield admitted and alleged that each of the L. O. stations was acquired or constructed by Richfield as an outlet for the sale of Richfield's Petroleum products to the motoring public; that each L. O. operator has been selected and trained by Richfield and has been permitted by Richfield to occupy Richfield's L. O. service station and use Richfield's land, buildings, facilities and equipment on a temporary basis subject to termination on 24-hours' notice by either party; that the occupancy of Richfield's L. O. service station by any such operator is upon the understanding that Richfield has the right to designate, as a condition upon the operator's continued occupancy thereof, the manner of such operator's maintenance and operation of the station including, among other matters, the appearance and clean-

liness thereof and the nature and extent of the services to be rendered to the motoring public, and upon the understanding that only Richfield's products be handled or sold in such service stations, subject to such exceptions as Richfield might permit from time to time. The Amendment to Answer alleged that the relationship between Richfield and any such operator is analogous to the relationship of agency or to the relationship of employment for the purposes of and within the scope and meaning of the Sherman Act and the Clayton Act, respectively; and that under the facts and circumstances so admitted and alleged, the trade, custom and business of each of Richfield's L. O. stations as conducted by any such operator is Richfield's trade, custom and business and is not the subject matter of competition.

With respect to the *Dealer stations* (both 337 and 3-C), Richfield's answer denied any contracts, agreements or understandings, written or oral, with the independent service station dealers by which any of such dealers is required to handle only the brands of petroleum products and automotive accessories designated or approved by Richfield, or is required to acquire automotive accessories from sources designated by Richfield; and Richfield denied that it has required such dealers to handle only Richfield's petroleum products or Richfield's "sponsored" automotive accessories, either by threats of cancellation of contracts or by inspection, policing or supervision; and Richfield denied that it has cancelled the written agreement of any independent service station dealer because of the refusal of such dealer to conform to any such alleged oral contract, agreement or understanding.

At the trial Richfield introduced evidence in support of its contention that the relationship between Richfield and the *L. O. operators* is such that the business of Richfield's L. O.

stations is not a legitimate market for its competitors; that the L. O. operators are not independent businessmen as that concept is understood in Anti-Trust law; and that the restrictions imposed by Richfield on the L. O. operators are exempt from and not cognizable under either § 1 of the Sherman Act or § 3 of the Clayton Act. The nature of the relationship was shown by evidence of the manner in which the L. O. operators were selected by Richfield for installation in its L. O. stations, which selection was made after an investigation of the prospective operator's character, reputation, family background and like qualifications; by evidence that Richfield furnished to each L. O. operator, at a rental substantially less than the fair rental value thereof, a fully equipped service station (excepting only small tools and lubricating equipment); and by evidence that prior to installation in one of Richfield's L. O. stations, the prospective operator is thoroughly instructed and informed of Richfield's requirements and practices concerning the various phases of the operation and maintenance by the prospective operator of the station, only one of which is the requirement that Richfield's petroleum products and automotive accessories be handled exclusively in the station. Richfield's requirements included, among other matters, the wearing of Richfield uniforms, that the stations be manned by a minimum crew of helpers, that the station remain open a designated number of hours, that the operator and his helpers maintain a standard of personal cleanliness in appearance, and that the operator follow a designated procedure in his manner of dealing with the public. Each operator before taking possession of the station is thoroughly advised that his tenure of the station may be terminated by either Richfield or himself on 24-hours' notice, and that Richfield requires such termination privilege as protection of its property, investment and merchandising program. None of the written leases used contain provision

for any specified term other than that it shall continue until terminated by either party on 24-hours' notice. The prospective operator is informed that he will not be permitted to acquire or develop any good will or to make a charge for any intangible business value to any successor operator; and he is informed further Richfield will take steps to assist him in the disposition of his approved petroleum products, automotive accessories and service station tools on termination of his occupancy. The prospective operator is advised in advance of his installation that Richfield's merchandising representatives will come to the station at regular intervals to train and instruct the operator and his employees and to inspect the manner of compliance by the operator with Richfield's various instructions concerning his operations and the maintenance of the station. L. O. operators are regularly and periodically trained, instructed and supervised at their respective stations. L. O. operators at times have been promoted from one L. O. station to another or to Richfield's Marketing Department. The following circumstances have warranted Richfield's terminating the tenure of an L. O. operator: insufficient inventory, operation of a dirty station, failure to maintain sufficient operating hours, absentee operation, or failure to carry Richfield products exclusively.

Richfield also introduced evidence in support of its contention that its acquisition and ownership of the L. O. stations served a valid business purpose to provide an outlet for its products, and that it was not Richfield's purpose or intention to suppress or affect competition. The evidence in this respect showed the nature of Richfield's need for outlets and the increase of such need since the termination of World War II as a result of various factors, including the enlargement of Richfield's refinery capacity during the war at the request of the Government and the discontinuance of purchases by the Government at the conclusion of

World War II. Notwithstanding the expenditures of substantial sums of money in the acquisition by Richfield of properties and the construction of service stations thereon, nevertheless, the number of Richfield L. O. stations has not increased; and Richfield had fewer L. O. stations as of December 31, 1950 than as of December 31, 1941. In excess of 81% of all L. O. stations owned or leased by Richfield as of December 31, 1950 were "self-created stations", i.e., stations built or caused to be built by Richfield on sites never theretofore used or equipped as service stations handling any petroleum products, either Richfield's or those of any competitor.

As to the *Dealer stations,* the evidence showed that each of the 337 dealers and each of the 3-C dealers executed a written contract for the purchase of a specified quantity of petroleum products; and that the quantity set forth in the contract was substantially less than the quantity of the dealer's anticipated purchases based upon his past experience. None of such contracts (excepting four contracts entered into with 3-C dealers prior to the decision in *United States* v. *Standard Oil Company of California* in 1948) provided for the purchase by the dealer of his "entire requirements" of any of the petroleum products described; and there was no evidence of any supplemental oral agreement between Richfield and any of the 337 or 3-C dealers relating to the exclusive handling of petroleum products and automotive accessories.

On July 2, 1951, the District Judge filed his Opinion, a copy of which is annexed hereto as Appendix A, announcing a decision in favor of plaintiff. Findings of Fact and Conclusions of Law herein were filed on August 2, 1951 and the Final Judgment herein in favor of plaintiff was filed and entered on August 2, 1951. Therein it was determined that Richfield's agreements with the L. O. operators and the 337

and 3-C dealers violated both § 1 of the Sherman Act and § 3 of the Clayton Act.

In its Final Judgment (paragraph VI) the District Court enjoined Richfield from exercising for any purpose the 24-hour termination clause in any L. O. lease and enjoined Richfield from cancelling any L. O. lease on less than 30 days' written notice to the operator; and, in addition, the District Court enjoined the cancellation by Richfield of any L. O. lease even on such 30-day written notice "excepting only for a breach of any of the written covenants contained" therein. Since the L. O. leases do not contain any expiration date or stated term, and since the L. O. leases contain no "written covenants" concerning compliance by the operator-lessee of the many requirements orally imposed as conditions of the operator's tenure, the effect of such provisions in the Final Judgment was deemed by Richfield to be invalid as being confiscatory (even if the determination of violation of § 1 of the Sherman Act and § 3 of the Clayton Act be affirmed by the United States Supreme Court), particularly in light of the fact that rentals payable by the L. O. operators are substantially less than the fair rental values of the stations; and Richfield so asserted in a motion under F.R.C.P. No. 52 to amend the Findings, Conclusions and Judgment. Such motion, which also sought the amendment of the Findings and Judgment in other respects, was denied by the District Court on August 17, 1951.

The Questions Are Substantial

I

The L. O. Stations

The District Judge ruled, in essence, that the "form" of the transaction chosen by Richfield precludes Richfield from requiring that the L. O. operators, in their operation of

Richfield's own stations, confine themselves to Richfield's products. The District Judge's Opinion states (Appendix p. 31): "*So Richfield is tied to the form they chose.* And if it does not give them immunity from the admitted restraints they impose through it, they must bear the consequences of their voluntary act, regardless of any contrary intention they may have had in choosing it." And the Opinion states further (Appendix p. 35): 'Even if it be admitted that if the outlet were its 'exclusive agency', the limitation could be imposed as an incident of ownership, *under the form it has chosen*, Richfield cannot deny to the dealers the right to deal with other suppliers as to their products . . ." (Emphasis ours.)

The *form* which the District Court felt compelled the conclusion of illegality is the written lease between Richfield and the L. O. operator. The lease, since it creates the relationship of landlord and tenant, was felt by the District Judge to preclude the recognition that there exists concurrently any additional relationship, either one of a traditional common law category such as employee or agent or one which, while not traditional, is nevertheless denominative of the economic realities of the situation in terms of restraint of trade.[2]

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[2] State Courts have not felt themselves so circumscribed by the form of a transaction, and have determined that notwithstanding the existence of a lease or of a landlord-tenant relationship, the circumstances in a situation comparable to Richfield's lease to the L. O. operator were such that:

(1) the oil company-lessor was held to be the employer of the operator-lessee and the latter's helpers for purposes of Workmen's Compensation Acts:

Continental Oil Co. v. *Sirhall*, 222 Pac. (2d) 612 (Colo. 1950); *Bieluczyk* v. *Crown Petroleum Corp.*, 58 Atl. (2d) 380 (Conn. 1948);

(2) the oil company-lessor was engaged in operating the station for purposes of chain store tax liability;

Maxwell v. Shell Eastern Petroleum Products, Inc., 90 Fed. (2d) 39 (C.C.A. 4, 1937);

The plaintiff, United States, recognized in its complaint in this case that since it did not charge Richfield with monopoly or conspiracy or a specific intent to violate the Anti-Trust laws, Richfield's contracts with the L. O. operators could violate those Acts only if (a) the L. O. operators were independent businessmen in the light of Anti-Trust concepts and (b) the business of the L. O. stations was a legitimate market and the subject matter of competition to the end that competitors could be injured by being foreclosed access therefrom. The complaint so charged in paragraphs 7, 13 and 21.

The District Court's Findings of Fact ignore and accordingly treat as immaterial all of the uncontradicted evidence pertaining to the nature of the relationship between Richfield and the L. O. operators which demonstrate that (1) in economic reality, the L. O. stations and their business as conducted by the L. O. operators are no more a legitimate market for Richfield's competitors than they would be if the operators were salaried employees of Richfield or agents in the strict common law sense; (2) in economic reality, the L. O. operators are not "independent businessmen", (regardless of whether they be deemed independent contractors); and (3) the L. O. operators are functionally an integral part of Richfield's own sales organization and the relationship between them and Richfield is not primarily that of buyer and seller.

If this portion of the District Court's decision is allowed to stand and thus to establish the law that § 1 of the Sherman Act and § 3 of the Clayton Act are violated by restrictions imposed by a manufacturer on its own sales organization with whom the manufacturer has an intimate

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Standard Oil Co. (Ind.) v. *State Board of Equalization*, 99 Pac. (2d) 229 (Mont. 1940);
Midwestern Petroleum Corp. v. *State Board of Tax Commissioners*, 187 N. E. 882 (Ind. 1933).

relationship akin to agency or employment and under circumstances showing the absence of a legitimate market and correlatively the absence of effect on competition, such sections of the Sherman and Clayton Acts will have been extended in operation far beyond their basic and underlying purpose and into a field in which they traditionally have had no application. Until the judgment in this action, no case had determined a violation of either of such Acts under the facts here present.

F. T. C. v. *Curtis Publishing Company*, 260 U. S. 568, 67 L. Ed. 408 (1923);

U. S. v. *General Electric Co.*, 272 U. S. 476, 71 L. Ed. 362 (1926);

Appalachian Coals, Inc. v. *United States*, 288 U. S. 344, 360, 77 L. Ed. 825, 830 (1933);

United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 280-282 (C.C.A. 6, 1898);

United States v. *Masonite Corporation*, 316 U. S. 265, 279; 86 L. Ed. 1461, 1476 (1942);

Pictorial Review Co. v. *Curtis Publishing Co.*, 255 Fed. 206 (D.C.N.Y., 1917).

Standard Oil Company of California v. *U. S.*, 337 U. S. 293, 93 L. Ed. 1371, relied upon by the District Judge in his Opinion, differs materially from this case. No issue was raised in that case that the lessees of Standard's stations were not "independent merchants"[3]; nor was there any issue or contention that the functional relationship between Standard and the lessees of Standard's stations differed in any respect from the relationship between Standard and the

[3] Standard had admitted in its Answer (Transcript on Appeal to U. S. Supreme Court, page 91): "That approximately 1800 of said service stations are leased to *independent operators* by leases. . . ."

service station dealers who owned their own stations and purchased products from Standard under the exclusive dealing contracts there involved. No contention was made by defendant Standard in that action that there was any intimate relationship between the defendant lessor and the service station lessees there involved, or that the lessor either reserved or exercised the right of control over the manner of operation of the service stations by the lessees, nor did it appear that any of such leases were terminable by the lessor or by the tenant on short term notice. The Supreme Court assumed for the purpose of its decision in the *Standard* case that all of the service station dealers covered by the judgment appealed were "independent". The Supreme Court's decision recognized that if an agency or employment relationship exists, any exclusive dealing required by the principal or employer would not violate § 3 of the Clayton Act. While the District Judge stated that the Richfield agreements "are of the type condemned by the decision in the Standard Oil case", he rejected as immaterial all of the evidence above referred to demonstrating that the relationship between Richfield and the L. O. operators is of such nature that restrictions imposed by Richfield thereon are no more a violation of the Sherman or Clayton Acts than were restrictions imposed by Standard upon its salaried employees in its company operated stations, which latter persons and stations were held by the same District Judge in the *Standard* case not to be subject to the Anti-Trust Laws. *U. S.* v. *Standard Oil Company of California*, 78 Fed. Supp. 850, 854.

Even if the decision of the District Court as to violation of § 1 of the Sherman Act and § 3 of the Clayton Act be affirmed, nevertheless, if there be allowed to stand that portion of the District Court's Judgment which enjoins Richfield from cancelling any L. O. lease excepting on 30

days' written notice and then "only for a breach of any of the written covenants contained" therein, the law will have been established for the first time that in a case not involving a monopoly or attempted monopoly or a conspiracy or a combination or an intent to violate the Anti-Trust laws, the District Court in its decree may properly include injunctive provisions of a confiscatory nature and which appear more onerous than any injunctive provisions ever approved by the U. S. Supreme Court in a divestiture decree in an Anti-Trust action.

II

The Dealer (Including 337 and 3-C) Stations

While the complaint alleged and the District Court determined the existence between Richfield and each 337 and 3-C dealer of supplemental oral agreements providing that the dealer shall purchase all of his petroleum products and automotive accessories from or through Richfield, nevertheless, the District Court's decision cannot be sustained on such ground since there is no evidence whatsoever in the record to support a finding of such a supplemental oral agreement between Richfield and any one or more of the 337 dealers in the 1361 stations of that type or any one or more of the 3-C dealers in the 261 stations of that type; and any such findings are "clearly erroneous" under Rule 52(a) of the F.R.C.P. In his Opinion the District Judge in effect recognized the failure of proof of the allegation of oral agreements and predicated his decision of the illegality of the written sales contracts (providing for the purchase, not of the dealer's "entire requirements", but of specific designated quantities) upon the existence of Painting Agreements between Richfield and certain of the dealers. The Opinion states (Appendix pp. 37, 38):

> "It is quite evident that the aim of the sales contract is to so control the outlet for petroleum products that

there is little, if any, room left for dispensing products other than those contracted for. Such arrangements were envisaged by me in the Standard case. And it was pointed out in that opinion that, while an agreement of this character would as effectively shut out access to other products, it still left a *possibility* of dealing with others should the operator be unable to secure his full supply from the contracting supplier.

The painting agreement is obviously intended to secure an exclusive outlet under the guise of a painting agreement. Richfield is not in the business of painting. And the undertaking to paint at a certain cost in consideration of flying its colors under penalty of repayment when the agreement is breached, when tied to a sales contract which envisages 80 per cent of the needs of the operator, and to which the painting contract specifically refers,—could have but *one object*, i. e., to shut out all competition. And, in reality, that was *the effect* of the arrangement." (Emphasis by District Court.)

It should be noted that neither the Sales Contract nor the Painting Agreement prevents or forecloses the dealer from buying from any of Richfield's competitors additional quantities of the same or other products.

If this portion of the District Court's decision be allowed to stand and thus to establish the law that a sales contract providing for a specified quantity of products substantially less than the purchaser's anticipated requirements is an illegal "exclusive dealing contract" when used in connection with a collateral agreement under which the purchaser, who has received without charge the painting of his place of business, agrees to repay to the seller the cost of such painting in the event the purchaser fails to purchase the specified quantity, the Anti-Trust laws will have been extended by judicial interpretation beyond their language or purpose.

It is respectfully submitted that the Supreme Court has jurisdiction upon direct appeal, and that the questions presented are substantial.

Dated: September 4, 1951.

WILLIAM J. DEMARTINI,
ROBERT E. PARADISE,
Attorneys for Defendant.

KRYSTAL & PARADISE,
Of Counsel.

APPENDIX

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 6896-Y

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

RICHFIELD OIL CORPORATION, *Defendant*

OPINION

Appearances:

For Plaintiff: William C. Dixon, Special Assistant to the Attorney General; Theodore M. Alexander, T. Keister Greer, Theron M. Hall, Lawrence M. Somerville, Special Attorneys, Anti-Trust Division, Department of Justice, Los Angeles, California.

For Defendant: William J. DeMartini, Robert E. Paradise, Los Angeles, California.

YANKWICH, *District Judge:*

This is an action instituted by the United States Government against Richfield Oil Corporation—to be referred to as Richfield—a corporation organized under the laws of the State of Delaware, with offices and its principal place of business in Los Angeles, California, in which the Government seeks equitable relief under Section 4 of the Act of the Congress of July 2, 1890, commonly referred to as the Sherman Anti-Trust Act (1), and under Section 15 of the Act of the Congress of October 15, 1914, as amended, commonly known as the Clayton Act (2). The Government seeks to prevent and restrain violations of Section 1 of the Sherman Anti-Trust Act (3) and Section 3 of the Clayton Act (4).

I

The Nature of the Controversy

Richfield is engaged in the business of acquiring and developing oil reserves and producing, transporting, refining and marketing petroleum and petroleum products therefrom in the States of California, Oregon, Washington, Nevada, Idaho, Arizona, Texas and New Mexico. No evidence was offered relating to activities in the States of Texas and New Mexico, but the pleadings alleged, and the evidence in the case showed, that, in the disposition of its products in the six States named, Richfield availed itself of various forms of outlets which were referred to as L-O (leased-out) stations, and "dealer" stations, designated as 337 and 3-C stations. Through regional representatives, merchandisers, salesmen and others, whose relation to the company need not be gone into, the petroleum products were supplied to the operators of these stations.

Richfield also deals in automotive accessories manufactured by others, which were referred to during the trial as "sponsored products". These consist of replacement parts and articles sold and used in servicing or repairing automotive vehicles. These include tires, tubes, batteries, spark plugs, oil filters, fan belts, battery cables, lamp bulbs, fuses, windshield wiper blades, tire repair and vulcanizing kits, anti-freeze, tire chains, and similar items.

During the trial, these were referred to as "TBA". It is the assertion of the Government that the various agreements, written and oral, existing between Richfield and the operators of these three types of stations, bind them, in effect, to secure *their entire requirements,* both as to petroleum products and TBA, exclusively from Richfield; that they are forbidden to handle petroleum products of any other company or to handle accessories competitive with those distributed or sponsored by Richfield.

In brief, the Government claims that these contracts are an unreasonable restraint of interstate trade or commerce, in violation of Section 1 of the Sherman Act, and substantially lessen competition and tend to create a monopoly in a

line of commerce, in violation of Section 3 of the Clayton Act.

Richfield has denied that there is a violation of either statute in their relations with any of the groups of dealers mentioned, either as to their petroleum products, or as to the sponsored TBA products.

II

The Commerce Involved

Despite voluminous testimony, the scope of the inquiry is rather narrow. The interstate origin and nature of the commerce of both the petroleum products and TBA is established beyond dispute. The petroleum products originate in oil reserves and producing wells and bulk plants and refineries operated in California and elsewhere, the products of which move across state lines continuously to supply the various stations. Richfield has oil reserves and producing wells in certain oil fields in California. Crude oil is transported by Richfield from producing wells in California to its refineries located at Watson and Vinvale, California. At the Watson refinery crude oil is refined into gasoline and other petroleum products. Richfield owns and operates two natural gasoline plants in California. Gasoline and other petroleum products refined at the gasoline plants in California are shipped by Richfield to its refinery at Watson, California. The petroleum products refined at its refinery at Watson, California, are, in some instances, shipped by Richfield from the refinery to bulk plants located in California, Oregon, Washington, Arizona, Nevada and Idaho. Gasoline and petroleum products are stored in bulk plants, and sold and delivered from time to time to service stations located in the respective states in which the bulk plants are located. Richfield maintains pipe lines in California used by it in transporting crude oil and petroleum products between points solely in California. It maintains automotive vehicles used in making deliveries of petroleum products from bulk plants to service stations located in the respective states in which the bulk plants are located.

Richfield owns 107 bulk plants in California, of which 23

are operated by Richfield and 84 by commission agents, from which petroleum products are distributed by Richfield and commission agents to 1577 service stations in California. It owns 35 bulk plants in Oregon, of which 2 are operated by Richfield and 33 by commission agents, from which petroleum products are distributed by Richfield and commission agents to 388 service stations in Oregon. Richfield owns 36 bulk plants in Washington, of which 4 are operated by it and 32 by commission agents, and from which bulk plants petroleum products are distributed by Richfield and commission agents to 646 service stations in Washington. Richfield owns 7 bulk plants in Nevada, all of which are operated by commission agents, and from which plants petroleum products are distributed by commission agents to 39 service stations in Nevada. Richfield owns 5 bulk plants in Idaho, all of which are operated by commission agents, from which petroleum products are distributed by commission agents to 56 service stations in Idaho. Richfield owns 22 bulk plants in Arizona, of which 2 are operated by Richfield and 20 by commission agents, from which petroleum products are distributed by Richfield and commission agents to 190 service stations in Arizona. In a few instances, petroleum products have been delivered from bulk plants in one state to service stations located in other states.

The sponsored products are manufactured at various industrial plants throughout the United States, from which they find their way first to the storerooms of the authorized Richfield distributors, and then to the shelves of the individual station operators. So there is a constant flow of interstate commerce in the operations of the defendant (5).

The competitive products, both petroleum and TBA, which were kept out of these stations as the result of the agreements, were manufactured at various places in the United States. So, in this respect also, if the practices of which the Government complains stand proved, they unquestionably affect the flow of goods and products in interstate commerce (6). The amount of commerce involved satisfies all the requirements of substantiality laid down by

the cases (7). The anti-trust laws forbid practices through which competitors are:

> "shut out of the market by a provision that limits it (a product), not in terms of quality, but in terms of a particular vendor" (8).

And, as said by the Supreme Court in another case:

> "The anti-trust laws are as much violated by the prevention of competition as by its destruction" (9).

Back of this is the fundamental determination embedded in the anti-trust laws to maintain our national economy free by keeping it competitive. The Supreme Court has expressed this thought very recently:

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent' " (10).

A few statistics supplied by Richfield, and culled from the record, will suffice to demonstrate readily that the commerce affected is substantial. The number of L-O stations in 1950 was 1343. The number of 337 stations was 1361. The 3-C stations numbered 261. The Government, by counting the separate written agreements, which go to make up each unit, including the painting agreements, arrives at a total of 4581. If to these are added the oral agreements affecting the stations, we have a total of 7546 written and oral agreements.

The written contracts are approved at one of Richfield's divisional offices, of which there are three located in the States of California and Washington. The contracts come to the respective offices in those States from various other States for approval. Some of the contracts are required to be approved at the main Richfield office in Los Angeles.

The gallonage of gasoline distributed in 1950 through the L-O stations was 160,795, of the money value of $23,790,-

968.00. The gallonage of gasoline distributed through the 337 stations during the same year was 67,476, with a money value of $10,164,158.00. As to the 3-C stations, the gallonage was 20,385, and the money value $3,069,987.00. For the same year the gallonage of motor oils and greases was, as to all types of stations, 3,491,369, of the money value of $2,546,127.59. For the same year, the money value of tires and tubes sold to all three types of stations was $2,646,-400.07, of batteries, $48,040.37, and of other accessories, $956,412.96. The interstate nature of the commerce involved and its substantiality, both from the standpoint of the number of outlets involved and the quantity and value of the products handled, being evident, the pattern of our inquiry becomes very narrow. It is reduced to the problem whether the agreements through which this commerce was handled are of the type condemned by the decision in the Standard Oil Case (11), decided by me in 1948, and affirmed by the Supreme Court (12).

It is to be borne in mind that the opinion of the Supreme Court contented itself with the determination that the agreements there involved violated Section 3 of the Clayton Act. Here, we are concerned with the alleged violation of both Acts. And the case calls for the determination of both questions.

But, while the same principles are to be applied to the three different outlets, it is necessary to examine separately their characteristics, in order to determine whether there is any difference (a) as to the relation existing between the operators and Richfield, and (b) the restrictive practices in effect.

III

The Leases on L-O (Leased-out) Stations

The problem is simplified as to the L-O stations by the Richfield admission that the oral understandings under which the leases are made, and for the violation of which the leases are forfeited under the 24-hours' termination clause, to be referred to, not only provide but *demand* that Richfield petroleum products and Richfield-sponsored TBA products be handled exclusively and without deviation.

So the main consideration as to these stations is the relations which control them. The extent of the commerce affecting these stations has already been adverted to. It should be added that Richfield claims an investment in these stations as of December 31, 1950, of $19,542,082.58, of which the cost of the land purchased represents $11,213,657.33, and the cost of improvements installed, $8,328,425.25. The latter figure was deducted as depreciation for tax purposes over a period of five years. The figures as to improvements relate chiefly to the stations themselves, and adjunct buildings and the permanent equipment. They do not include improvements such as tanks, pumps, compressors, hoists, neon signs, hiboys and the like.

In justification of the investment, and, for that matter, of the entire policy, Richfield asserts that once "the shooting war" was over, and the purchase of gasoline by Government agencies had decreased, it was *compelled* to find an outlet for the increased refining facilities which it had built during the war period, and that the only certain way of securing an assured market was through controlled units.

Intent and purpose are an element in a case involving violation of Section 2 of the Sherman Act (13). But such violation is not concerned with a specific intent. And a specific intent, or good motive, for that matter, is not material when we deal with Section 1 of the Sherman Act (14), or Section 3 of the Clayton Act (15). The determining consideration is the effect of a particular practice on interstate trade or commerce. Other considerations, *such as economic necessity,* do not, and should not enter into our inquiry whether the practices here involved violated either statute (16).

Very recently the Supreme Court rejected a contention that the anti-trust statute should not be given full effect in a particular field, in view of certain current foreign trade conditions (17). The argument is just as valid when applied to market conditions as to petroleum and allied products in a specific area in this country. Economic considerations are relevant in determining legislative policy. They may be important in interpreting the limit of that

policy. They do not constitute an excuse for the violation of the legislative policy declared in a statute.

These preliminary observations clear the way for a consideration of the nature of the arrangements under which the L-O stations were operated. The foundation of the relations was the service station lease, denominated Form 542. It was prepared by Richfield, underwent several changes through the years, and, in its final form, as it appears in this case, it was an elaborate lease containing fifteen different clauses setting forth the conditions governing the transfer of the property.

The habendum clause of each lease leases the described real property and the improvements and facilities thereon to the designated lessee for a definite period of time, subject to a 24-hours' termination clause, at a specified rental per month, payable in advance on the first day of each of the calendar months. In addition to this, the lessee agrees to pay as rental a sum equivalent to the total number of gallons of gasoline in excess of a certain stated maximum, delivered to the premises during the month for which payment is being made for resale and distribution, the rate being fixed for each of the twelve months of the year, on the basis of the excess over a definite amount of gallons. Richfield has the right to demand a deposit of cash or bond to secure the payment of the rent in amount equal to the average rent payable.

The lease limits the use of the premises to the operator of a gasoline station, prohibits the use for any other or an unlawful purpose, and forbids the commission of a nuisance by the lessee. The prohibition by law of the continuance of the business terminates the lease. There follow provisions placing upon the lessee the duty to maintain the premises and the improvements in good repair and a clean and safe condition, and prohibiting the making of changes or alterations without the permission of the lessor. The remaining clauses may be summed up briefly. The lessee, upon expiration of the lease or its termination, agrees to surrender the premises in as good a condition as when received, wear and tear excepted. Destruction by fire terminates the lease. The lessee is responsible for all charges

for utilities. Failure to comply with the terms of the lease, default in payment of rent, bankruptcy or insolvency, the levying of an attachment, assignment or execution, or the institution of any other legal proceedings affecting the premises or any of the equipment on them, is ground for termination without notice. The lease is not assignable, either voluntarily or by operation of law. And the lessee agrees to indemnify the lessor against any claims for injury to property or person occurring on the premises during the operation of the lease by himself, his agents or employees. There follow the usual general clauses protecting against waiver of breach, making provision for attorney's fees for the lessor in case of suit, and designating the place to serve notice, and *merging into the instrument all other agreements.*

IV

The Nature of the Lessee's Interest

If this instrument is assayed by the accepted tests which determine the relation of landlord and tenant, the conclusion is inescapable that it is a lease. For we have a relation which is the result of specific agreement, which calls for (a) a fixed term, (b) at a determined rental, (c) by which a specific estate passes to the tenant, (d) who takes exclusive possession of the premises against all the world, including the owner, (e) all the lessee's rights being subordinated to the primary right to the fee of the owner, and (f) subject to reversion to him at the end of the term, or on termination of the lease (18).

Implicit in the contract is the lessee's assumption of obligation and responsibility for his own acts upon the premises and those of his employees in their relation to the public, who come in contact with them during the time of his dominion. The lessee is not the employee of Richfield. Richfield pays him no wages or other remuneration. He must carry his own workmen's compensation. He is not carried on their books as an employee for the purpose of social security taxes or any of the withholding taxes, state or federal, incidental to the employer-employee relationship. Richfield is not required to withhold any moneys from

him for income tax purposes. Neither are they required to perform any of the duties just mentioned as to any of the employees who may assist the lessee in the conduct of the station or of any auxiliary repair work upon the premises. The lessee is solely responsible for his own conduct and that of his employees which may cause damage to the person or property of others. In brief, it would be difficult to find an instrument which so completely makes, by its own terms, the lessee master of the domain covered by the lease as does this lease. He is certainly as independent as any lessee is. And the relationship is no different than that found in the "leased-out" stations in the Standard case (19).

When, in law, we speak of "an independent contractor", or "an independent business man", we deal with a practical concept, not with a philosophical phrase. We mean a person who, in the performance of a particular contract, or in the conduct of his business, acts chiefly *for himself* and *for his own benefit and profit*, and *not* for others and the benefit and profit of others. And this is true, even though, as in every contract, the other party to the contract may also derive benefits. Mutuality of benefits lies behind every contract. And the fact that a party to such contract may derive a benefit or impose conditions in the carrying on of an enterprise which transcend the usual conditions, does not destroy the independent character of the other party.

In a sense, in this complex and interdependent world, no one is really independent. But when, through a formal and written instrument, a relationship is established by which exclusive possession and control of property is turned over to another, in exchange for a specified rental, with full responsibility for the conduct of the business falling upon the lessee, with all profit or loss accruing entirely to him and not to the transferor, the relationship satisfies all the requirements of an independent enterprise. And when a corporation like Richfield deals with such an enterprise, it cannot be said to be dealing *with itself*, as though the estate it created were nothing and the person in charge, to whom possession was turned over, is a mere employee because, under clauses not contained in the contract, they supervise

his actions, regulate,—to some extent,—his personal appearance, and do other things, some distinctly illegal, as will presently appear.

In this respect, the Timkin case, already referred to, is very revealing. It involved a prosecution under Section 2 of the Sherman Act. It was Timkin's contention,—*as it is the contention of Richfield,*—that certain wholly-owned subsidiaries were *so controlled* by them, that, in reality, *they were not other corporations* with which they could conspire to violate the Act. But the Supreme Court declined to allow the control to destroy the existence of the units as separate business entities, and held that the law was violated when Timkin engaged in the prohibited acts *with its own subsidiaries.* Just as Richfield here would have us characterize their relationship with the L-O stations by some name unknown to common-law categories, Timkin, in that case, resorted to the term "joint venture" to avoid the charge of illegality. But the Supreme Court's answer was brief and decisive:

> "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. E. G. Kiefer-Stewart Co. v. Seagram & Sons, supra at 215. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture'. Perhaps every agreement and combination to restrain trade could be so labeled" (20).

The principle which the Supreme Court applied is not new. That Court has repeatedly declared that

> "common ownership and control does not liberate corporations from the impact of the anti-trust laws" (21).

This indicates clearly that the principle is applicable whether we are dealing with a monopoly case under Section 2 of the Act—as the Timkin case was,—or a case in restraint

of trade under Section 1 of the Act. Rightly. For in all these cases, the Courts have insisted

> "reality must dominate the judgment" (22).

And, if control of instrumentalities which results in abolishing competition among them were sufficient to relieve the parties of the effect of the agreement on interstate commerce, the purpose of the Act could be subverted by the establishment by large industrial concerns of "puppet" outlets tied to the parent organization by the most restrictive agreements which would not only unreasonably restrain trade and lessen competition, but actually destroy it.

In interpreting this and other statutes, we must eschew the tyranny of words or labels. We must, in each case, get behind the façade which the organization has created,—as did the Supreme Court in the Masonite case when it went behind a del credere agency, which, at first blush, seemed to be a fiduciary relationship established by the concern for its own purposes, and found, instead, a means for monopolization. The Court did not then hesitate to declare the agency a mere cloak for restraints:

> "So far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in the term of restraint of trade" (23).

In the light of these norms, we continue our analysis of the relations established by the written lease. The operator pays for his gasoline and the petroleum products sold to him by Richfield. They are not merely consigned to him. Upon execution of the lease, if he was preceded by another lessee, he pays for the inventory of petroleum products on the premises, and of the approved TBA products. He is responsible for credit losses, except such as result from extension of credits to customers carrying Richfield cards. If we consider the provision for 24-hours' termination as valid, the lessee has, at the worst, *a tenancy at will*. And in the American law of landlord and tenant, this is an estate carved out and independent of, but subordinate to, the

estate of the transferor (24). While the ancient common law did not favor this form of estate, it recognized it. Indeed, even in the absence of a statute the courts of England required a notice to quit in order to terminate the estate (25). State courts, including those of California, have followed the trend of turning an estate at will into an estate for a definite term whenever, through the method of paying rent, or other provisions in the lease, it was apparent that a definite term was contemplated (26).

So the Courts have done all in their power to give to this estate, so humble in the feudal law, a higher standing in accordance with their desire to achieve a more rational and just relationship than strict application of antiquated feudal principles would warrant. And it is interesting to note that in a very early California case,—even before the law as just stated became crystallized,—the Courts ranked the rights of a tenant at will *so much higher* than those of an employee that they rejected the contention of one who was the caretaker of property of another that he be considered a tenant at will, saying:

> "Such a principle is not countenanced by the authorities, and its adoption would lead to very inconvenient results. *It would give to servants and agents novel and embarrassing powers over employers and their property*" (27). (Emphasis added.)

And I am inclined to think that, because of the conflict of the 24-hours' termination clause with the monthly rental provisions, Courts would consider the tenancy created by the L-O agreements, *at least*, a month-to-month tenancy *terminable only* upon the minimum notice required in such cases.

In the case before us, there is no evidence that it was ever used as a means for terminating the lease for the infraction of any of its express conditions. It was used only to enforce the illegal restraints superimposed orally. Indeed, it was the boast of the representatives of the Company that so long as the provision as to exclusive dealing in Richfield products or Richfield sponsored TBA products were complied with, the tenancy was of practically *unlimited duration*, and that prospective lessees *were so informed*.

V

The Oral Requirements Restrictions

So we come to the question: Is the independence, both legal and factual, created by the lease destroyed by the oral agreements and conditions superimposed by Richfield and which binds the lessee to the distribution of Richfield petroleum products and Richfield sponsored TBA products under penalty rigidly enforced—as the record shows,—of ouster unceremonious on 24-hours' notice, sometimes effected between sundown and sunup of successive days? Richfield insists that it is. The fact of control is admitted in their Answer, which states:

> "That each of the service stations owned by Richfield or leased by Richfield from a party other than the operator thereof, was acquired and/or constructed by Richfield as an outlet for the sale of Richfield petroleum products to the motoring public; and that each operator of any such service station has been selected and trained by Richfield and has been permitted by Richfield to occupy such service station and use Richfield's land, building facilities and equipment on a temporary basis subject to termination on 24-hours' notice."

Evidencing the rigor with which the control was exercised, there were shown at the trial instances of termination of the lease for failure to conform to the restrictions as to the products to be sold. On termination, no matter how long the occupancy had been, the lessee was not allowed to choose his successor, even in cases where the latter had agreed to purchase from him not only the petroleum products and approved products, but also the non-approved items on his shelves or equipment which he had installed. On termination, it was Richfield's policy to instruct the buyer that he "was not required" to buy the non-sponsored TBA products or other equipment owned by the lessee. And in all instances in which the suggestion was made, "he did not buy". Nor did Richfield allow the lessee to capitalize on his good will. On termination, the lessee could receive no compensation for good will, even when he found a buyer

willing to pay for the good will which the long occupancy and the efforts of the lessee had created at the particular station.

These and other incidences of control, not spelled out in the lease, but made effective through Richfield's exercise of power, led Richfield to insist at the trial that their control over the L-O type station *was*, in effect, *ownership*. And they sought to apply to this ownership my statement in the Standard case that restrictive agreements are not prohibited as to wholly-owned outlets. (28)

We need not quarrel with the statement referred to, although the form in which it was cast indicates clearly that it applied only to the facts there before the Court. However, the discussion which precedes indicates that the Supreme Court has held repeatedly that even ownership does not stand in the way of the application of the restraint provisions of the Sherman Anti-Trust Law. (29) And the obvious answer to the claim of ownership is the same which Courts give in tax cases to the contentions of taxpayers who, after having chosen to do business under a certain form of organization, try to have us disregard it, on the ground that they were, in reality, "doing business with themselves". (30) And the answer is that a person choosing a particular entity in order to achieve certain results is not in a position to ask us to disregard it, when he wishes to avoid results unanticipated.

So Richfield is tied to the form they chose. And if it does not give them immunity from the admitted restraints they impose through it, they must bear the consequences of their voluntary act, regardless of any contrary intention they may have had in choosing it.

VI

The "Created" Market

Richfield contends that it "created" these instrumentalities for its own purpose. For this reason, they argue that there could be no restraint of trade, because no competition is involved. No case will be found which supports the contention that the mere creation of an exclusive form of outlet is, in itself, sufficient to avoid the consequences

of the anti-trust laws. Indeed, one of the elder cases (32) to which the case cited by Richfield referred as its authority, specifically holds that contracts, no matter how worded, will be scrutinized in order to determine whether they have been entered into or are to be performed for the apparently legitimate purpose which they specify on their face or *for the purpose of restraining the free flow of commerce.* We quote the language of the Court:

> "The court in the Standard Oil Case construed the act as intended to reach only combinations unduly restrictive of the flow of commerce or unduly restrictive of competition, and, illustrating what were such undue or unreasonable combinations, it classed as illegal (p. 58) 'all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of *reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy'.*" (33) (Emphasis added)

And in the very case referred to, the following is given as the purpose of the anti-trust statutes:

> "Combination which unreasonably limits competition which would otherwise exist between persons in similar businesses is illegal. A suppression of competition necessarily restrains commerce. Board of Trade v. United States, 246 U. S. 231, 38 S. Ct. 242, 62 L. Ed.. 683, Ann. Cas. 1918D, 1207. The purpose of the anti-trust laws—an intendment to secure equality of opportunity—is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete." (34)

The vice of the entire argument lies in the fact that it permits suppression of competition *at the inception of an enterprise,*—a practice against which the Clayton Act is specifically directed. As is shown in this case,—a concern such as Richfield, through investment of large sums of money in real property and on stations, could so tie the hands of the sellers of its products as to completely shut out competition. If the fact that no outlets for the product existed before Richfield entered the field, would give complete immunity, regardless of the purpose for which the outlets are established and of the manifest intent to keep out competitors and to deny to the public at large access to competitive products through these outlets, then the anti-trust laws could be circumvented easily.

But the argument lacks substance. The trade was there, it being the custom for which it was bidding. And, if in bidding for it, it eliminated others and prevented their access to the products, the market is unreasonably restrained. As said by a unanimous Supreme Court:

> "In order to establish violation of the Sherman Act, is it not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement? The interest of the public in the preservation of competition is the primary consideration. The prohibitions of the statute cannot ' . . . be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.' " (35)

Neither the Curtis case (36) nor the Masonite case (37) warrants the conclusion that the creation of individual outlets creates such immunity. In the Curtis case the Court found that the contracts under consideration created an "agency" between the parties which had none of the features condemned by the anti-trust law. Such relationship found to have been legitimately entered into by the Federal

Trade Commission on findings of fact conclusive upon the Court, the Court found no legal reason to condemn, saying:

> "The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evidence clearly shows that respondent's agency contracts were made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. * * * Effective competition required that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute." (38)

The Masonite case has already been commented on. (Part IV of this Opinion) There the Court found no difficulty in condemning what were apparent del credere agencies as means for illegitimate restraint. Convinced that the object of the establishment of the agency was to restrain commerce, the Court found no difficulty in disregarding the form. Richfield has enunciated an abstract concept which finds no justification in the history or interpretation of the anti-trust laws. To follow it would mean to turn defiance of law into a virtue, to make legitimate the very *means* of restraint. Granted that a business may create its own outlets, it can do so only by making them *its agency in truth and fact.* It cannot do so by creating a well-recognized legal estate, superimpose on it oral limitations, the object of which is to restrain trade, and then claim legitimacy for this very restraint. Even exclusive agencies, if they are

of a character as to result in business restraints of commerce, would be violative of the Clayton Act, even if, at their creation, they did not violate the Sherman Act.

So Richfield cannot, by creating the relationship of landlord and tenant, long and anciently known to our law, with all the responsibilities that such relationship imposes on the transferee, restrain trade through that outlet by imposing illegitimate oral contracts which restrict the transferee to the handling of Richfield's products or Richfield's sponsored products. Even if it be admitted that if the outlet were its "exclusive agency", the limitation could be imposed as an incident of ownership, under the form it has chosen, Richfield cannot deny to the dealers the right to deal with other suppliers as to their products, or to deny to such suppliers access to the dealers, so that these varied products may reach the public, whose protection the anti-trust laws seek. The law, as the Supreme Court has stated,

> "does not compel competition" (39).

But restrictive contracts are condemned because of their

> "denial to commerce of the supposed protection of competition" (40).

And, as said in the same case, when such restrictions

> "are parts of a plan, the mere projecting of which condemns them unconditionally, the realization of the plan itself must also be proscribed" (41).

It follows that the L-O operators are, by the instrument of their creation, independent business men, as that concept is understood in anti-trust law, and that the imposition on them by oral agreements of restrictive conditions limiting their dealings to Richfield products and Richfield sponsored TBA products, and denying access to other dealers in petroleum and accessories to these stations, and, through them, to the public, is violative of both Section 1 of the Sherman Anti-Trust Law and Section 3 of the Clayton Act.

VII

The "Dealer" Stations

We come now to the agreements under which the other stations are operated. We refer to the 337 stations and to the 3-C stations. As to these stations, Richfield admits that they are independent. Their chief witness and general manager in charge of sales, W. G. King, admitted that they were such, and he applied the designation to station dealers "who owned their places of business or leased them from others than Richfield."

The problem as to these stations is, therefore, a factual one: Do the written instruments under which these stations dispense Richfield products and Richfield sponsored TBA products and the oral agreements accompanying them restrict them to the handling of these products exclusively?

Richfield has classified these stations as "dealer stations". They include service stations which are owned by service station dealers or leased by them from a lessor other than Richfield. Richfield has leased these stations from the dealers, and, in turn, has sub-leased them back to the dealers and has entered into a written sales contract with each dealer covering the petroleum products to be handled by the dealer. Each of the units into which this group is divided—337 and 3-C—is governed by multiple instruments.

In the case of the 337 stations, the fundamental instrument is a service station lease, originally running from the owner to Richfield, and an operator's lease from Richfield to the operator, the operator assuming, in substance, the obligations of Richfield under their primary lease, with some modifications at times as to the rent paid. The record discloses that in some instances, the rental received by Richfield from the operator is less than it pays under its lease with the owner.

For brevity's sake, we omit the description of the terms, which are the usual terms in such leases. Their enumeration would not aid the discussion, because the tie-in as to these stations is represented by an operator's sales contract whereby the operator agrees to purchase from Richfield a *definite* quantity of gasoline, lubricating oil and greases for

each month. The evidence in the record shows that the computation intended to cover 80 per cent of the estimated requirement.

As to the other stations, presumably stations owned by the operator as to which no landlord and tenant relationship exists between Richfield and the operator or Richfield and the original owner, the tie-in agreement consists of a sales contract of the type already described and a painting agreement whereby Richfield agrees to paint the station in its own colors and insignia. After an expenditure of a definite sum of money, the dealer agrees to

> "remove from the surface of the station which is to be painted all signs and insignia, and upon completion of the painting of said service station by Richfield, shall not place upon or over the painted surfaces any advertising sign, trademark, insignia, or any other matter without first procuring the consent and approval of Richfield."

And Richfield retains the right to cause the removal of any signs placed in violation of this clause. The violation of any of the terms of the agreement makes the dealer liable to Richfield for the amount expended in painting.

It is quite evident that the aim of the sales contract is to so control the outlet for petroleum products that there is little, if any, room left for dispensing products other than those contracted for. Such arrangements were envisaged by me in the Standard case. And it was pointed out in that opinion that, while an agreement of this character would as effectively shut out access to other products, it still left a *possibility* of dealing with others should the operator be unable to secure his full supply from the contracting supplier.

The painting agreement is obviously intended to secure an exclusive outlet under the guise of a painting agreement. Richfield is not in the business of painting. And the undertaking to paint at a certain cost in consideration of flying its colors under penalty of repayment when the agreement is breached, when tied to a sales contract which envisages 80 per cent of the needs of the operator, and to which the

painting contract specifically refers,—could have but *one object*,—i.e., to shut out all competition. And, in reality, that was *the effect* of the arrangement.

Richfield's witnesses testified that the instructions to their representatives were "to persuade" the dealers working either under 337 or 3-C arrangements to confine themselves to Richfield products. On the other hand, individual operators of these types of stations have testified to the fact that they were "coerced" into limiting themselves to Richfield products, that they were "called on the carpet", as it were, if other products were on their shelves.

It is not denied that Richfield maintained a policy against "split" pumps,—that is, pumps of other gasoline distributors. And it is quite evident that, in one form or another, the policy has been enforced, and that the moment gasoline of another concern was handled by any of the operators on these leases,—as one of their own witnesses put it,—Richfield "was no longer interested in the station", and terminated their relationship. Some of Richfield's own field representatives, called by the Government, testified that their instructions as to these stations were not to accept them and sell products to them, except upon a hundred per cent basis, i.e., that they deal only in Richfield products. Unauthorized signs were reported to Richfield. Orders were given to remove these competitive signs, when discovered. And, as to both types of stations, Richfield salesmen testified that their instructions were that only approved merchandise was to be handled, and that they understood the sales and painting agreements to call for that policy, and so informed the operators of "dealer" stations.

There is also evidence that, despite the asserted independence of these operators so far as TBA products are concerned, in reality, there was coercion to induce them to confine their dealings to the sponsored products. In truth, there is evidence that the policy of the Company was that if "any dealer" refused to interest himself in Richfield sponsored TBA products, "then it's a new dealer",—i.e., the instructions were to cancel the arrangement, whatever it was.

The fact that non-sponsored TBA products were more profitable to the dealers, either because of better discounts

or quicker fulfillment of warranties, shows Richfield's motivation in keeping this trade for itself by means of these agreements. It is true there were denials by witnesses for Richfield. But it is significant that the denials are mostly by persons who either made policy or carried it into effect, or who testified to instructions given or received on the subject.

On the other hand, the existence of the practice is testified to by men in charge of the stations or by men in the field who testified to *particular* experiences and incidents.

So the trier of fact must choose. And, when confronted by a series of instruments, the sole object of which is to tie these stations to contracts which, in effect, are *requirement* contracts, although not so denominated, the testimony of the men in the field who actually were told that they *could not* trade freely with outsiders fits into the scheme which the sales contracts coupled with the leases, and the sales contracts coupled with the painting agreements, evidently was intended to set up.

We conclude, therefore, that the agreements relating to L-O, 337 and 3-C stations under which Richfield has operated in the six named States, are, and each of them is, in their creation and effect, in violation of Section 1 of the Sherman Anti-Trust Act and Section 3 of the Clayton Act. (42)

Judgment will, therefore, be for the plaintiff upon the following specific findings:

(1) The Richfield agreements as to each of the three types of stations relate to interstate commerce.

(2) They affect, and the transactions under them are, in the course of interstate commerce.

(3) The relation established by each of the three types of agreements, L-O, 337 and 3-C, is that of independent contractor, each of the operators being an independent business man, as that term is understood in anti-trust law.

(4) The 24-hours' termination clause has been used as an instrumentality to force upon the lessees of L-O stations illegal restrictions as to the types of petroleum and sponsored TBA products to be handled on the premises.

(5) The 24-hours' termination clause is invalid, against

public policy, and cannot, either under state or federal law, be enforced as a means of terminating the lease for even legal grounds by any notice by either side less than at least the minimum rental period for which rent is reserved, one month.

(6) Richfield should be prohibited from using the 24-hours' termination clause at all to enforce its restrictive conditions as to the products sold on the premises.

(7) The agreements in the form of leases, sales contracts and/or painting contracts, and the oral agreements superimposed on them confine the operations of the stations to which they apply to dealing exclusively with Richfield petroleum products and automotive accessories handled or sponsored by Richfield.

(8) The agreements lock out dealers from sources of competitive products originating in interstate commerce.

(9) The agreements deny to dealers and, through them to the public, access to such competitive products.

(10) The agreements deny to manufacturers or suppliers of such products access to the outlets controlled by the independent business men who operate the three types of stations.

(11) The agreements affect a substantial number of outlets and a substantial amount of products, whether considered comparatively or not.

(12) The agreements constitute an unreasonable restraint of trade and commerce among the States, under Section 1 of the Sherman Anti-Trust Act. (15 U.S.C.A., Sec. 1)

(13) The agreements result in a substantial lessening of competition and tend to create a monopoly in a line of commerce in contravention of Section 3 of the Clayton Act. (15 U.S.C.A., Sec. 14)

(14) The agreements are illegal in their effect and should be enjoined.

Dated this 2nd day of July, 1951.

LEON R. YANKWICH,
Judge.

NOTES TO TEXT

1. 15 U.S.C.A., Sec. 4.
2. 15 U.S.C.A., Sec. 25.
3. 15 U.S.C.A., Sec. 1.
4. 15 U.S.C.A., Sec. 14.

5. Santa Cruz Fruit Packing Company v. Labor Board, 1938, 303 U.S. 453, 463; United States v. Yellow Cab Company, 1947, 332 U.S. 218, 224-226; United States v. Paramount Pictures, 1948, 334 U.S. 131, 173; Carter Carburetor Corp. v. Federal Trade Commission, 1940, 8 Cir., 112 F(2) 722, 730; United States v. Standard Oil Company of California, 1948, D.C. Cal., 78 F. Supp. 850, 856, and cases cited in Notes 3 and 4.

6. See writer's opinion in United States v. Standard Oil Company of California, 1948, D.C. Cal., 78 F. Supp. 850, 856-864, and cases cited in Footnotes 4-33. And see, Fashion Originators' Guild v. Federal Trade Commission, 1940, 2 Cir., 114 F(2) 80, 84-85; Wickard v. Filburn, 1942, 317 U.S. 111, 118-128; Mandeville Farms, Inc. v. American Crystal Sugar Company, 1948, 334 U.S. 219, 229-234.

7. Standard Oil Company v. United States, 1911, 221 U.S. 1, 61; Indiana Farmer's Guide Company v. Prairie Farmer Publishing Company, 1934, 293 U.S. 278-279; United States v. Columbia Steel Company, 1948, 334 U.S. 495, 525; United States v. Griffith, 1948, 334 U.S. 100, 105-107; William Goldman Theatres, Inc. v. Loew's, Inc., 1945, 3 Cir., 150 F(2) 738, 744.

8. International Salt Company v. United States, 1947, 332 U.S. 392, 398.

9. United States v. Griffith, 1948, 334 U.S. 100, 107.

10. Standard Oil Company v. Trade Commission, 1951, 340 U.S. 231, 248-249; See the writer's opinion in Balian Ice Cream Company v. Arden Farms Company, 1950, D.C. Cal., 94 F. Supp. 796, 801, and cases cited in Notes 18 and 19; and F. & H. Ice Cream Company v. Arden Farms Company, 1951, D.C. Cal., — F. Supp. —, especially Note 44, which gives a history of the development of the concept which led to the adoption of the anti-trust laws. And see, Shotkin v. General Electric Company, 1948, 10 Cir., 171 F(2) 236, 238; United States v. Underwriters' Assn., 1944,

322 U.S. 533, 553-554. And for a comprehensive review of the anti-trust laws, see, "Anti-Trust Law", The University of Illinois Law Forum, Vol. 1950, No. 4, pp. 491-672.

11. United States v. Standard Oil Company of California, 1948, D.C. Cal., 78 F. Supp. 850.

12. Standard Oil Company of California v. United States, 1949, 337 U.S. 293.

13. 15 U.S.C.A., Sec. 2. See, United States v. Griffith, 1948, 334 U.S. 100, 105-106; United States v. Paramount Pictures, 1948, 334 U.S. 131, 173-174.

14. 15 U.S.C.A., Sec. 1. See Paramount Famous Corp. v. United States, 1930, 282 U.S. 30, 44; United States v. Masonite Corp., 1942, 316 U.S. 265, 275; Fashion Originators' Guild v. Federal Trade Commission, 1940, 2 Cir., 114 F(2) 80, Note 6.

15. 15 U.S.C.A., Sec. 14. See, Fashion Originators' Guild v. Federal Trade Commission, 1941, 312 U.S. 457, 468-469.

16. Standard Oil Company v. United States, 1949, 337 U.S. 293, 311-313.

17. Timkin Roller Bearing Co. v. United States, No. 353, Supreme Court, decided June 4, 1951.

18. 51 C.J.S., Landlord and Tenant, Secs. 1-3; 32 Am. Jur., Landlord and Tenant, Sec. 2.

19. United States v Standard Oil Co. of California, 1948, D.C. Cal., 78 F. Supp. 850. Richfield contended at the trial that, as to certain leased stations, Standard had admitted that they were operated by "independent contractors". But the conclusion reached in the case was not based upon any admission. Standard contested all the way the validity of the tie-in contracts as to "every type" of station involved. And the conclusion that certain station operators were independent contractors was based upon the facts in the case and not upon any admission by Standard. (See Finding 3, p. 875 of Opinion.)

20. Timkin Roller Bearing Company v. United States, No. 352, Supreme Court, decided June 4, 1951.

21. Kiefer-Stewart Company v. Seagram & Sons, Inc., 1951, 340 U.S. 211, 215; and see, Appalachian Coals, Inc. v. United States, 1933, 288 U.S. 344, 360-361; 376-377; United States v. Yellow Cab Co., 1947, 332 U.S. 218, 227.

22. Appalachian Coals, Inc. v. United States, supra, p. 360.

23. United States v. Masonite Corp., 1942, 316 U.S. 265, 280.

24. 51 C.J.S., Landlord and Tenant, Sec. 156; 32 Am. Jur., Landlord and Tenant, Secs. 66-70; Restatement, Property, Secs. 21,45: California Civil Code, Sec. 761; and see, Smith v. Royal Insurance Company, Ltd., 1940, 9 Cir., 111 F(2) 667, 670-671.

25. Spiritwood Grain Co. v. Northern Pacific Ry. Co., 1950, 8 Cir., 179 F(2) 338, 341.

26. Phelan v. Anderson, 1897, 118 C. 504, 505-506; see, Psihozios v. Humber, 1947, 80 C.A. (2) 215, 220; Camp v. Matich, 1948, 87 C.A. (2) 660-667.

27. Mitchell v. Davis, 1862, 20 C. 45, 47-48; This early case enunciated a rule, which has since become general. 32 Am. Jur., Landlord and Tenant, Sec. 9.

28. United States v. Standard Oil Company of California, 1948, D.C. Cal., 78 Fed. Supp. 850 at 854.

29. See cases cited in notes 21 and 22 and see Associated Press v. United States, 1945, 326 U. S. 115.

30. Pacific Magnesium Co., Inc. v. Westover, 1948, D. C. Cal., 86 Fed. Supp. 644 and cases cited in notes 4-6 therein; Pacific Magnesium Co., Inc. v. Westover, 1950, 9 Cir. 183 Fed. 2d 584.

31. There is a statement in one of the cases to which they refer, Wm. Goldman Theaters, Inc. v. Loew's, Inc., 1945, 3 Cir., 150 Fed. 2d 738 at 743: "The restraint of trade contemplated by statute means restraining competition. United States v. Eastern States Retail L-D, Ass'n., 234 U. S. 600, 34 S. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788."

In the case to which reference is made in support of this statement, United States v. Eastern States Retail Lumber Dealers Ass'n., 1914, 234 U. S. 600, 601, I find no language capable of being epitomized in this manner.

32. United States v. Eastern States Retail Lumber Dealers Ass'n., supra.

33. United States v. Eastern States Retail Lumber Dealers Ass'n., supra, page 601.

34. Wm. Goldman Theaters, Inc. v. Lowe's, Inc., 1945, 3 Cir 150, 78 Fed. 2d 738, 743.

35. Paramount Famous Lasky Corp. v. United States, 1930, 282 U. S. 30, 44.

36. Federal Trade Commission v. Curtis Company, 1923, 260 U. S. 568. The scope of the case is so limited in Carter Carburetor Corp. v. Federal Trade Commission, 1940, 8 Cir., 112 F(2) 722, 736.

37. United States v. Masonite Corp., 1942, 316 U. S. 265, 280.

38. United States v. United States Steel Corp., 1920, 251 U. S. 417, 451.

39. United States v. United States Steel Corp., supra, p. 451.

40. United States v. Aluminum Company of America, 1945, 2 Cir., 148 F(2) 416, 428.

41. United States v. Aluminum Company of America, supra, p. 428. And see, Standard Fashion Co. v. Magrane-Houston Co., 1922, 258 U. S. 346, 356; M. A. Adelman, "Effective Competition and the Anti-Trust Laws", 1948, 61 Harvard Law Review, p. 1289. It should be added that, in the solution of the problem which confronts us, we must bear in mind the type of legislation which we are interpreting. And cases holding operators of stations of this type *employees* under a state Workmen's Compensation Act (Continental Oil Co. v. Sirhall, 1950, — Colo. —, 222 P(2) 612), or subjecting individual stations to state chain stores taxes (Standard Oil Company of Indiana v. State Board of Equalization, 1940, 110 Mont. 5, 99 P(a) 229; Maxwell v. Shell Eastern Petroleum Products, Inc., 1937, 4 Cir., 90 F(2) 39) do not help. For, in interpreting Workmen's Compensation or taxing statutes, Courts notoriously interpret their terms broadly, so as to achieve the beneficent social aims of the statutes. (See, Fox v. Standard Oil Co., 1935, 294 U. S. 87) Nor, for that matter, are we assisted by the recent decision of the District Court of Appeals of California (Mayes v. Richfield, 1951, 103 A. C. A. 23), which has held Richfield liable to third persons for injuries suffered on the premises of one of the L-O stations. The case was decided upon the theory, submitted to a jury, that, in

view of the public purpose of the business conducted on the premises, the lessor could be held liable, if the leased premises *were not safe for the use intended,* and the condition existed at the time of the transfer.

This decision is in accord with the general view that, while a landlord of leased premises is not ordinarily liable for the injuries occurring thereon, he will be held liable where the property is leased for public purposes,—which the public is expected to enter for the transaction of business (32 Am. Jur., Landlord and Tenant, Sec. 668). So the California Court, in applying this rule to one of the L-O stations, did not make a determination of the nature of the occupancy binding on us.

On May 17, 1951, the Supreme Court of California granted a hearing in the case. This means that the Opinion loses all force as a precedent. For the Supreme Court may repudiate the doctrine announced in it. But even if it should stand, it does not go counter to views here expressed.

42. Richfield seems to find comfort in, and justification for, its position in an article, "Exclusive Dealer Devices of Petroleum Products," by Forrest Revere Black, 1940, 29 Georgetown Law Journal, pp. 438, et seq. The article was written before some of the most important decisions in the field of anti-trust law, including the decisions in the Standard case dealing with restrictive contracts, were made. More, a study of the article shows that what the writer sought to show was various devices resorted to by certain companies in order to *avoid* the consequences of regulatory statutes.

His introductory paragraph reads:

> "In any comprehensive history of government regulation of business in America, one chapter must be reserved to relate *the strange story of the ingenious strategy* of the major oil companies in marketing their products through the so-called 'Iowa Plan' and cognate devices, whereby the operator *simulates* the appearance of an independent dealer and the major producing companies thereby *acquire an exclusive outlet and attempt to evade* the obligations of chain store taxes, social security legislation, Workmen's Compensation

> Laws, public liability insurance and labor troubles from attempts at unionization and collective bargaining" (p. 429) (Emphasis added).

Speaking more specifically of petroleum products, the article states:

> "The retail marketing of petroleum products has gone through several states. The dominant consideration on the part of producers has been a mad race to secure additional retail outlets and increased gallonage, and usually connected with this has been *an attempt to exclude the sale of competitor's products and to control the resale price*" (p. 439-440) (Emphasis added).

While describing the various marketing methods, including what is known as the "Iowa Plan",—the general effect of which is to make the operator simulate the appearance of an independent dealer when he is, in reality, the manager of a chain store,—*the author does not give them his approval* as successful attempts at avoiding the effect of controls. But, even if such methods of evasion appealed to a writer as a lawyer, they certainly *do not deserve* the approval of a Court. In the field of anti-trust regulations, the aim of courts has always been to look behind devices which, under the appearance of innocuous arrangements,—such as exchange of information, listing of customers and the like, involved attempts to restrain and prevent competition and to enthrone monopoly. So here, our problem is to see what the *true relationship* is, regardless of what Richfield and the operators under its denomination *thought it to be*. And, as already appears, what to Richfield may seem *apparent* independence is demonstrably *real* independence, so far as the application of principles of anti-trust law are concerned. So, to apply a philosophical phrase, what to Richfield seems to be mere *appearance*, has to us, all the indicial of *reality*.

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A. The nature of Richfield's relationship with the L. O. operators is such that the trade and custom of the L. O. stations as operated by the L. O. operators is Richfield's trade and custom and is not the subject matter of competition between Richfield and its competitors and is not a legitimate market for Richfield's competitors. Neither Section 1 of the Sherman Act nor Section 3 of the Clayton Act apply to Richfield's restrictions on the L. O. operators any more than they apply to restrictions imposed by a supplier on its own employees or agents operating in the supplier's own places of business 52

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